TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 267

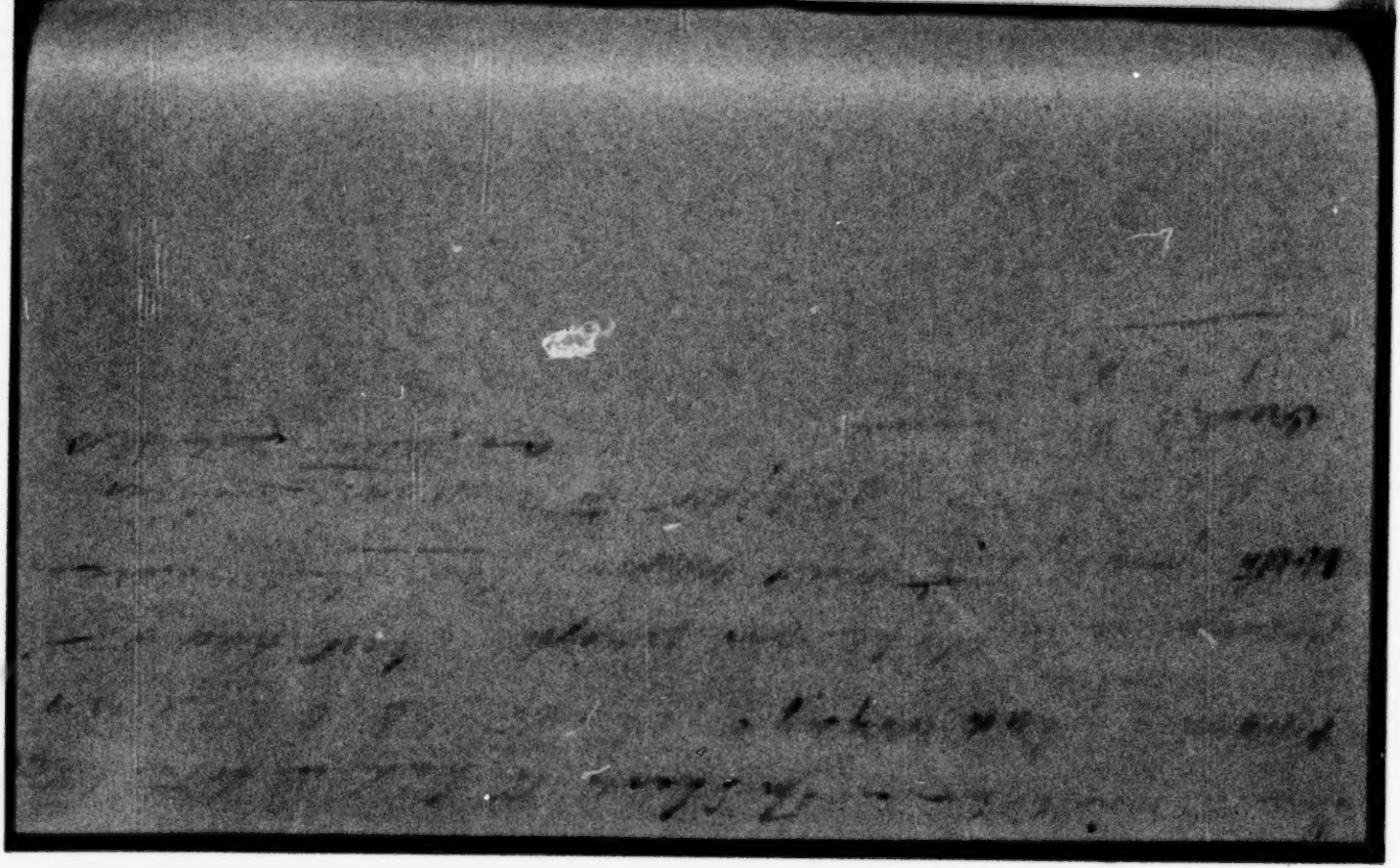
THE UNITED STATES OF AMERICA, APPELLANT

vs.

FREIGHTS, SUB-FREIGHTS, CHARTER HIRE, AND/OR SUB-CHARTER HIRE OF THE S. S. "MOUNT SHASTA"

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

FILED JANUARY 31, 1927



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becomes due and payable, pay, discharge or make adequate provision for the satisfaction or discharge of every lawful claim or demand which, if unpaid, might in equity, in admiralty, at law or by any statute of this or any other nation where said vessel may be navigating or berthed, have such priority over the title and interest, or might operate as a lien, encumberance or charge upon said vessel or cause its detention in port, provided, however, that this provision shall not apply to the extent that there may be pending on behalf of either of the parties hereto with solvent underwriters, not yet having been paid nor formally rejected, a claim for reimbursement on account of the matter on which any such lien is alleged to be founded, nor to the extent that the owner has or has received insurance money properly applicable as reimbursement on account of such matter, or to the payment or discharge thereof; always, however, subject to the condition that the said vessel be discharged from any libel, attachment or other detention under process or color of legal authority within fifteen days from time when the same attaches."

5. That said demise or bare boat charter among other things contained the following provision:

3 "The charter shall pay to the owner prior to the delivery of the vessel the sum of $30,821.95, for the option to purchase hereinafter contained; and in addition thereto shall pay to the owner for the use of said vessel $56,240.00 for said thirteen months, payable $72,420 in advance upon delivery of vessel and $56,240 ($3.9 per DWT.) per calendar month thereafter in advance, and at and after the same rate for any part of a month; hire to continue until her delivery in like good order and condition to the owner (unless lost or unless charterer exercises option to purchase) at a United States Atlantic port north of Hatteras. All hire shall be paid to the owner in the District of Columbia, in gold coin or its equivalent."

"The owner shall have a lien upon all cargoes, and all sub-freights for any amounts due under this charter party."

For greater certainty libellant refers to said demise or bare boat charter and begs leave to produce a copy thereof at the trial of this cause.

6. Pursuant to the terms of said demise or bare boat charter alleged aforesaid, said steamship "Mount Shasta" was delivered to said Victor S. Fox & Company, Inc., on the thirtieth day of May, 1930, at which time the said Victor S. Fox & Company, Inc., accepted delivery of the said vessel and entered upon the performance of the terms of the said demise or bare boat charter above alleged.

7. That on July 14, 1930, said Victor S. Fox & Company, Inc., entered into a sub-charter (voyage) agreement with Palmer & Parker Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts and having a usual place of business in Boston in the District of Massachusetts, for the purpose of carrying a full and complete cargo of round and square mahogany log on an under deck from three ports, Gold Coast, West Africa, Half Assinio, Axim and Secondi, to Boston, Mass., and pursuant to said

sub-charter (voyage) agreement the vessel was dispatched to Dakar and loaded by the charterer with twenty-two hundred and forty-seven (2,247) mahogany logs, and arrived on February 19, 1921, with said cargo of logs at the port of Boston, Mass. For greater certainty as to the terms of said sub-charter (voyage) agreement between Victor S. Fox & Company, Inc., and Palmer & Parker Company of Boston, Mass., libellant refers to said sub-charter (voyage) agreement, and begs leave to produce a copy thereof at the trial of this cause.

8. That under the terms of the demise or bare boat charter
4 above alleged there became due and payable to the libellant on the first day of March, 1921, the sum of two hundred and eighty-nine thousand, six hundred and eighty ($289,680) dollars, as and for hire on the said steamship "Mount Shasta," from August 1, 1920, to April 1, 1921. That the said Victor S. Fox & Company, Inc., has failed and refused and still fails and refuses to pay said charter hire, although same has been duly demanded and the sum is now due and owing to the libellant.

9. That there is now due and unpaid as freight on the said cargo of 2,247 mahogany logs, referred to in the seventh paragraph of this libel, the sum of one hundred thousand dollars ($100,000.00) as near as can now be estimated, constituting the freights, sub-freights, charter hire, and or sub-charter hire for the said steamship "Mount Shasta" during the period of said charter referred to in the seventh paragraph of this libel; that said sum is now in the hands and possession of the said Palmer & Parker Company.

10. That under and by virtue of the demise or bare boat charter referred to in the second paragraph of this libel, entered into between the United States of America and Victor S. Fox & Company, Inc., and under and by virtue of all the contracts of affreightment and under the general maritime law, the United States has a lien upon said freights, sub-freights, charter hire, and or sub-charter hire for said hire due it under said demise or bare boat charter, which lien the United States desires to enforce in this action.

11. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore the United States claiming a lien upon said freights, sub-freights, charter hire and or sub-charter hire in the sum of two hundred and eighty nine thousand six hundred and eighty dollars ($289,680) now due it and unpaid as above set forth, prays that proc-
ess in due from of law may issue against the freights, sub-freights, charter hire, and or sub-charter hire of said steamship "Mount Shasta" and against all persons interested therein, and that
5 a monition may issue against the said Palmer & Parker Company and against all other persons in interest, commanding it and them to pay the said freight money into court; that all persons interested therein may be cited to appear and answer under

oath in the premises and that this honorable court may be pleased to pronounce for the aforesaid damages and costs, and for such other and further relief as to justice may appertain and as this court is competent to give in the premises.

UNITED STATES OF AMERICA,
By DANIEL J. GALLAGHER,
United States Attorney.
JAMES G. AYLWARD,
Assistant United States Attorney.
LEWIS GOLDBERG,
Proctors for the United States.

COMMONWEALTH OF MASSACHUSETTS.
Suffolk, ss:

BOSTON, *March 23, 1921.*

Personally appeared James F. Aylward and made oath in due form that he is an assistant United States attorney within and for the District of Massachusetts, duly authorized to act on behalf of the United States by the Attorney General of the United States, and that he has subscribed the foregoing libel as proctor for the United States, and that the same is true to the best of his knowledge, information, and belief.

Before me,

WILLIAM E. HURLEY,
Notary Public.

6 In United States District Court

Warrant and monition and marshal's return.

Thereupon, on said 23rd day of March, A. D. 1921, by order of the judge, a warrant and monition issued, commanding the marshal to give notice to all persons concerned that the foregoing libel had been filed and that trial would be had thereon at a district court, to be holden at the United States court house, at Boston, in said District of Massachusetts, on the first day of April next, at ten o'clock a. m.; and to give notice by advertising the same in the Boston Marine Guide, one of the public newspapers printed at said Boston, and by posting a copy of the same notice at the said court house in Boston, seven days at least before said day of trial; and to take said freights, sub-freights, charter hire, and/or sub-charter hire into his custody; and further to serve this precept by reading the same or giving a copy thereof to the master or other officer in charge of said vessel or freights, etc., and if no such person is found by him, then to serve the same in the manner aforesaid, upon some owner or agent of said vessel or freights, etc., if any be finds within his precinct.

And the Marshal made a return as follows:

UNITED STATES OF AMERICA,
Massachusetts District, ss:

BOSTON, *March 24, 1921.*

Pursuant hereunto, I have given notice to all persons concerned that the libel within named has been filed, and that trial will be had thereon on the first day of April, 1921, by advertising the substance of the within monition in the Boston Marine Guide, one of the public newspapers printed at Boston, in said district, and by posting up a copy of the same notice in the United States court house in Boston, in said district, seven days before the day within named for trial. And on the 24th day of March, 1921, I served the within precept upon Palmer & Parker Co., by giving in hand to Gordon Parker, vice-president thereof, a true and attested copy of the within precept, at Charlestown, in said district.

PATRICK J. DUANE,
U. S. Marshal.
By BENJAMIN J. SCULLY,
Deputy U. S. Marshal.

7 In United States District Court

Exceptions to libel

Filed September 16, 1922

To the Honorable James M. Morton, Jr., Judge of the United States District Court for the District of Massachusetts:

Exception of Palmer & Parker Co., respondent to the libel of United States of America "against the freights, sub-freights, charter hire, and/or sub-charter hire of the SS. 'Mount Shasta' now intact and in possession of the Palmer & Parker Co., of Boston, in the District of Massachusetts, claiming a lien thereon, and against all persons lawfully intervening therein and having any interest therein, in a cause of contract, civil and maritime," alleges as follows:

1. That the said libel fails to show that there was in the hands of the respondent at the time of the bringing of said libel, or at any time theretofore, any property constituting the subject matter of a lien, civil and maritime.

2. That the said libel fails to show that there was in the hands of the respondent at the time of the bringing of said libel, or at any time theretofore, any property subject to any lien, civil and maritime, whereof the said libelant might avail itself.

3. That the said libel fails to show that the libelant had at the time of the bringing of this libel, or at any time theretofore, possession of that cargo referred to in said libel in paragraphs seven, nine and ten, respectively.

4. That the said libel sets forth no cause of action against the respondent in contract civil and maritime, either express or implied.

5. That the said libel sets forth no admirality and maritime cause of action whatsoever against the respondent.

Wherefore, the respondent prays that the libel may be, as to the respondent, dismissed with costs.

THOMAS HUNT,
GASTON, SNOW, SALTONSTALL & HUNT,
Proctors.

8 In United States District Court

Answer

Filed September 18, 1922

To the Honorable James M. Morton, Jr., Judge of the United States District Court for the District of Massachusetts:

The answer of Palmer & Parker Co., a corporation organized and existing under the laws of the Commonwealth of Massachusetts, having its principal place of business at 101 Medford Street, Charlestown, City of Boston, District of Massachusetts, unto that libel of the United States of America, which the said libelant described therein as "its libel against the freights, subfreights, charter hire, and/or subcharter hire of the S. S. 'Mount Shasta' now intact and in the possession of Palmer & Parker Company of Boston, in the District of Massachusetts, claiming a lien thereon, and against all persons lawfully intervening therein or having any interest therein, in a cause of contract, civil and maritime."

By reason of the extraordinary form and unprecedented substance of the libel aforesaid, Palmer & Parker Co. is much perplexed as to the nature of the capacity in which it now appears before this honorable court, since it comes claiming no property which has been arrested by process, nor does it appear obedient to the commands of any monition issuing out of this honorable court. An exception to the form, substance and sufficiency of the said libel has been taken by its proctors, and is now before this honorable court.

But Palmer & Parker Co. is fearful lest by its continued silence and the lapse of time, it be technically precluded, by the terms and provisions of that certain act of Congress of the United States known as "An act authorizing suits against the United States in admiralty," etc., approved March 9, 1920, from availing itself of certain defence which it might now and hereafter in good conscience propound, save for the possible temporal limitations imposed upon its rights by the terms and provisions of the act aforesaid. Therefore, Palmer & Parker Co. prays that it may, without prejudice to its
9 aforesaid exception to the said libel, and to its right to answer hereafter more fully to the said libel, now appear as respondent.

The respondent, so appearing, upon knowledge, information, and belief, affirmatively alleges and articulately propounds, as follows:

1. That the United States of America is, and was, at all times hereafter mentioned, owner of the S. S. "Mount Shasta," as propounded in article 1 of said libel.

2. That the respondent at no time became a party to, or was bound by, any instrument identical with, or similar to, that alleged "demise or bare-boat charter" set forth, declared upon, or referred to in the said libel in articles 2, 3, 4, 5, 6, and 8, respectively, nor had the respondent, at any time hereinafter mentioned, notice of the existence of said alleged "demise or bare-boat charter" if any such instrument did and does exist, nor is it, as to the times hereinafter mentioned, chargeable with notice thereof.

3. That the respondent at no time entered into any undertaking, either express or implied, with the libelant, having to do with any matter in connection with that charter party of affreightment bearing date of July 14, 1920, covering the S. S. "Mount Shasta," set forth, declared upon, or referred to in said libel in articles 7, 9, and 10, respectively.

4. That the said charter party of affreightment was entered into between and executed by "Victor S. Fox & Company, Inc., Agents," for principals and/or owners undisclosed, and Palmer & Parker Co., charterers.

5. That the S. S. "Mount Shasta" on or about August 9, 1920, arrived at the port of Axim, Gold Coast, West Africa, for loading, and the said vessel at the time of her arrival at the said port was destitute of supplies, and the master of the said vessel was without funds for her proper disbursement, and the master of the said vessel, one A. Kuipers, did then and there solicit Ralph D. Sawyer, agent of the respondent for the ports of Axim and Seccondi, Gold Coast, West Africa, that he should supply and advance unto the said vessel such necessary supplies and moneys as were required by the said vessel that she might sustain her crew, load her cargo, and proceed upon her voyage.

6. That although the respondent as charterer of the said vessel was in no wise bound, by the terms and provisions of the said charter party, of affreightment, to disburse the said vessel, the said Ralph D. Sawyer did, as agent for the respondent, advance unto the said vessel sundry necessary supplies and moneys, and said advances were made to the said vessel at the said port of Axim and the said port of Seccondi, within the ebb and flow of the tide, upon the faith and credit of the said vessel, and upon the additional security of the freight.

7. That the said necessary supplies and moneys, furnished and advanced as aforesaid, are particularly set forth, item by item, in a photostatic copy of the statement thereof bearing date September 19, 1920, and duly approved by the said master, which photostatic

copy of statement is hereto annexed in four pages marked Sechedule A, pages 1, 2, 3, and 4, expressly incorporated herein and made a part of this answer; and the value thereof was, and is, in pounds sterling of Great Britain, forty three hundred sixty one pounds, one shilling and two pence (£4361-2-1) and the interest thereupon, at the rate of six per cent per annum from September 19, 1920, is in amount five hundred twenty eight pounds, eight shillings and two pence (£528-8-2).

8. That there is this day owing and unpaid unto the respondent on account of aforesaid advances and on account of the interest aforesaid thereupon, a sum, according to the rate of international exchange this day prevailing, in the amount of twenty one thousand six hundred sixty dollars and thirty three cents ($21,660.33).

9. That the sum of twenty one thousand six hundred sixty dollars and thirty three cents aforesaid still remains wholly due and owing to the respondent and is unpaid.

10. That the said sum of twenty one thousand six hundred sixty dollars and thirty three cents ($21,660.33) due, owing
11 and unpaid as aforesaid, constitutes and is a deduction from any and all freights that were earned or might have been earned by the said S. S. "Mount Shasta" under the terms and provisions of the charter party of affreightment aforesaid, and said advances constitute and are for the respondent, pro tanto, a good and sufficient defence against the lawful claims of any and every person whatsoever making claim for freights earned and/or due under the said charter party of affreightment, if any be, or become, now or at any time, due.

11. That the libelant is, was at the time of the bringing of the said libel, and has been at all times herein mentioned, a stranger to the said charter party of affreightment and to the entire transaction; nor had it, at any time herein mentioned, possession and control of the said S. S. "Mount Shasta" and/or the cargo thereof.

12. That all and singular the premises are true, and if denied, in verification thereof the respondent prays leave to refer to depositions, exhibits, and other proofs to be by it shown in this cause.

Wherefore, the respondent prays that this honorable court will be pleased to pronounce against the libelant aforesaid, to dismiss the said libel, and to condemn the libelant in costs, and otherwise to administer right and justice in the premises.

PALMER & PARKER CO.,
By GORDON PARKER,
Vice President.

THOMAS HUNT,
GASTON, SNOW & SALTONSTALL,
Proctors.

12 [*Duly sworn to by Gordon Parker; jurat omitted in printing.*]

13 - *Exhibit to answer*

STATEMENT.—S. S. "MT. SHASTA" IN A/C WITH PALMER & PARKER CO. AXIM

Dr.					Cr.			
Aug. 9	To light due	11	4	—	Aug. 31. By cash from J. H. Lushie from discount			5
10	" cash on a/c	153	—	—	Balance	888	13	4
11/13.	" cable & telegram	6	13	9				
	" boat hires	1	—	—				
	" cash on a/c	160	—	—				
	" foodstuff from Mrs. Grant	30	3	—				
	" provisions from Macy & Co.	36	—	—				
19	" cash on a/c	200	—	—				
26.	" foodstuff bills from Effuch Hgibus	140	10	—				
	" foodstuff William Fynn Sheet "C"	15	7	9				
	" foodstuff from Mrs. Grant	19	6	10				
	" foodstuff sheet No. 81	9	19	3				
	" sundry cash as pr. sheet or list No. 82	35	19	4				
	" boat hires	2	—	—				
	" bill for 10 bags rice from Grant & Co.	22	—	—				
	" bill from Quashie 5 bags rice	10	—	—				
	" cash chicken & boat hire	1	11	—				
	" 5/8 11 meal sheet 85	64	15	—				
	" cash by order	—	5	—				
	" 6 bowls from R. Hamilton & Co.	3	3	5				
		£888	13	4		£888	13	4

Seconds. 1st trip.
To balance bfd.

Schedule A, page 1.

14	28/31. To amt. bfd.	888	13	4	Aug. 30/31. By cash from			
	" cash on a/c	200	—	—	" Capt.	34	5	—
	" —d—	200	—	—	" Balance	2,328	5	11
	" L. S. Grachey cattle	376	5	—				
	" bill from Swanzey Transp. Secondee	87	2	6				
	" 16 I. I. C.	400	7	1				
	" F. & A. Swanzey	—	15	—				
	" Telegrams	—	6	11				
	" Pump repaire	5	—	—				
	" Telegram	—	1	1				
		£2,362	10	11		£2,362	10	11
Sept. 1.	To Balance	2,328	5	11	Sept. 6. By amt. carried down	2,693	3	4
	" Cash boat hires	—	10	—				
5.	" —d—	—	10	—				
	" —d—	—	10	—				
6.	" washings	6	15	4				
	" medical attendance	6	6	—				
	" wages watchman	1	12	—				
7.	" cablegram	3	4	—				
	" wages stevedore	3	9	—				
	" Foodstuff by William Fynn	7	18	9				
	" Do. Do. by Effuah	93	1	4				
	" F. & A. Swanzey	256	11	—				
	" Cust. boat hire	—	10	—				
		£2,693	3	4		£2,693	3	4
Sept. 6.	To Amt. bet. down	2,693	3	4				
	" Bank charges on transfer to Commons of cattle	3	11	—				
		2,696	14	4				

Schedule A, page 2.

Exhibit to answer—Continued

STATEMENT.—S. S. "MT. SHASTA" IN A/C WITH PALMER & PARKER CO. AXIM—Continued

Dr.

					Cr.			
15	Sept. 9. To amt. bl.	£	2,066	14 4				
	18. " I. I. Co. Bill approved		414	18 8				
	" Doctor's bill 31.87 20		3	3 —				
	" Do. Do.		4	10 6				
	" Bills No. 10322 & 10323		33	— —				
	" Bill 309 & C Capt. 5246		18	17 6				
	" Bills from Cr Coast Mchy 1800/410 & 433		20	1 —				
	To cash		100	— —				
	" draft on I Leone		503	— —				
	" tripe, boat hire, bath water, Secundee (10% a) 14/9/20		1	— —				
	Cost for landing labourers custom fee		3	18 60				
	Bill 18. 92 for supplies		14	5 —				
		£	3,797	10 6	Sept. 19. By amt. carried down		3,828	5 6
	To Amt. of 246 H. Mutton supplied of Sept. by Bodu		30	15 —				
		£	3,828	5 6			£ 3,828	5 6
Sept. 19.	To amt. bet. down		3,828	5 6				

Schedule A, page 2.

15a	Sept. 19. To amt. bird	£	3,828	5 6	Sept. 19. By supply of bird to Stargers		32	11 3
	" wages of stevedores as per list		349	8 6			4,150	17 9
	" do. for overtime		0	15 —				
		£	4,183	9 —			£ 4,183	9 —
Sept. 19.	To balance due		4,150	17 9	Sept. 19. By balance c/d		4,153	7 9
	" amt. of doctor's bill at Secondee		2	10 —				
		£	4,153	7 9				
	To balance		4,150	7 9	Sept. 19. By amt. of overtime		19	14 6
	" 5% agency fee on		207	13 5	Balance due		4,347	6 8
		£	4,361	1 2			£ 4,361	1 2
Sept. 19.	To balance due	£	4,347	1 2				

Four thousand three hundred & forty-seven pounds one shilling & two pence.

*Agency commission.

Subject to owners approval E. & O. E.

STURFERD,
Master S. S. Mount Shasta.

16 In United States District Court

Motion to amend libel

Filed November 7, 1922

Now comes the United States and moves that its libel be amended in the following particulars:

Article 3. That the said steamship was chartered to the Mount Shasta Steamship Company, for whom Victor S. Fox & Company acted as general agents.

ROBERT O. HARRIS,
United States Attorney.
By CHARLES P. CURTIS, Jr.,
Special Asst. U. S. Attorney.

In United States District Court

Motion to pay freights into court

Filed November 7, 1922

Now comes the United States, and whereas process in due form of law having issued against Palmer & Parker Company of Boston in said district citing it to show cause why certain freight moneys due from it on account of a certain voyage of the S. S. "Mount Shasta" should not be paid into court, and whereas the said Palmer & Parker Company not having paid any of the said moneys into court, moves that this honorable court issue an order requiring said Palmer & Parker Company to pay into court, to abide any decree or decrees which may be entered in this cause, all the freight moneys due from it on account of the agreement or arrangement alleged in the 11th article of the libel.

ROBERT O. HARRIS,
United States Attorney.
By CHARLES P. CURTIS, Jr.,
Special Asst. U. S. Attorney.

In United States District Court

Interrogatories of the United States propounded to Palmer & Parker Company

Filed November 9, 1922

1. Did you on or about July 14, 1920, charter the S. S. "Mount Shasta" from Victor S. Fox & Company, agents, for a cargo of mahogany logs to be transported from West Africa to Boston,
17 Massachusetts? If so, please annex a copy of the charter.

2. Did the "Mount Shasta" thereafter carry a cargo of mahogany logs from West Africa to Boston by virtue of the provisions of this charter?

3. Did you accept delivery of a cargo consisting of about 2,247 mahogany logs from the "Mount Shasta" in February, 1921, at Boston? If so, how many tons of 2,240 pounds of mahogany logs were delivered to you?

4. What was the freight per ton under the terms of this charter?

5. What was the demurrage per day under the terms of this charter?

6. Was any demurrage agreed to in writing between the master of the said steamship and Palmer & Parker by any of its agents? If so, please annex a copy of such agreement.

7. Was any bill of lading made out for any such shipment of mahogany logs? If so, please annex a copy.

8. Have any of the freights agreed to under the said charter party been paid by you to anyone?

9. If so, when were they paid and to whom?

10. Has any demurrage under the said charter party been paid to anyone?

11. If so, when was it paid and to whom?

ROBERT O. HARRIS,
United States Attorney.
By CHARLES P. CURTIS, JR.,
Special Asst. U. S. Attorney.

In United States District Court

Minute entries

On the 13th day of said November, said cause was set down for hearing on the motion to pay freight money into court, the Honorable Elisha H. Brewster, district judge, sitting.

On the said 13th day of November, the following special appearance of Palmer & Parker Company and objection to payment of

18 In United States District Court

Special Appearance of Palmer & Parker Company

Filed November 13, 1922

Now comes Palmer & Parker Co., of Charlestown, City of Boston, within this district, and appears before this honorable court for the purpose of opposing a certain motion of the libellant in the above-entitled cause, which motion is now before this honorable court, and by which the said libellant seeks to compel Palmer & Parker Co. to pay into the registry certain moneys alleged to be due upon a certain charter-party of affreightment of the S. S. "Mount Shasta."

And Palmer & Parker Co., saying that it is in truth the Palmer & Parker Co. named in the said libel, now appears before this honorable court specially and without prejudice and for the sole purpose of opposing this motion.

And Palmer & Parker Co. refers to those recitations in the said motion by the libellant made, which are as follows:

(1) "And whereas process in due form of law having issued against Palmer & Parker Co. of Boston in said district citing it to show cause why certain freight moneys due from it on account of a certain voyage of the S. S. 'Mount Shasta' should not be paid into court."

(2) "And whereas the said Palmer & Parker Co. not having paid any of the said moneys into court * * *."

And as to the first of the recitations aforesaid, Palmer & Parker Co. denies that any process has issued against it out of this honorable court, "citing it to show cause why certain freight moneys due from it on account of a certain voyage of the S. S. 'Mount Shasta' should not be paid into court."

And as to the second of the recitations aforesaid, Palmer & Parker Co. denies that it has in any wise failed to comply with any monition or order which has at any time issued out of this honorable court in the above-entitled cause.

And for verification of this its denial of the allegations and innuendoes in the aforesaid recitations contained, Palmer & Parker Co. begs leave to call to the attention of this honorable court the record of the court in the above-entitled cause, and it submits that the said record verifies and substantiates this its denial.

And Palmer & Parker Co. denies that there was at the time of the bringing of said libel or at any time thereafter, or that there is now in its hands and possession, any sum of money or any fund
19 to which the libellant may in any wise lay claim.

And Palmer & Parker Co. denies that there was at the time of the bringing of the said libel or at any time thereafter, or that there is now, in its hands and possession any property capable of seizure and arrest by process issuing out of this honorable court, in the above entitled cause.

And Palmer & Parker Co. denies that there is now in the custody of this honorable court any property seized or arrested pursuant to process issuing out of this honorable court in the above entitled cause, to which Palmer & Parker Co. has at any time laid claim or now claims.

And Palmer & Parker Co. denies that it is in any wise a party to this cause and says that in this cause this honorable court has no jurisdiction over it.

Wherefore Palmer & Parker Co. prays that the said motion be denied.

PALMER & PARKER CO.,
By GORDON PARKER,
Vice President.

THOMAS HUNT,
GASTON, SNOW, SALTONSTALL & HUNT,
Proctors.

[Duly sworn to by Gordon Parker; jurat omitted in printing.]

19a

In United States District Court

Motion for default

Filed November 13, 1922

Now comes the United States and moves that whereas the libel was filed on March 23, 1921, and certain interrogatories were propounded on November 9, 1922, and whereas no answer or
20 answers have been filed to either the libel be taken as confessed and the Palmer & Parker Company be defaulted unless answers to the libel and to the interrogatories be filed within ten days.

ROBERT O. HARRIS,
United States Attorney.
By CHARLES P. CURTIS, JR.,
Special Asst. U. S. Attorney.

In United States District Court

Special appearance and objection of Palmer & Parker Company

Filed November 16, 1922

Now comes Palmer & Parker Company, of Charlestown, city of Boston, within this district, and appears before this honorable court for the purpose of opposing a certain motion of the libellant in the above entitled cause, which motion is now before this honorable court, and by which the said libellant seeks to compel Palmer & Parker Company to answer to the said libel and to the interrogatories propounded to Palmer & Parker Company by the libellant.

And Palmer & Parker Company, saying that it is in truth the Palmer & Parker Company named in the said libel, now appears before this honorable court specially and without prejudice, and for the sole purpose of opposing this motion.

And Palmer & Parker Company says that no monition has issued against it out of this honorable court compelling it personally to appear to answer any allegation in the said libel contained; nor is it a claimant before this honorable court in the above entitled cause.

And Palmer & Parker Company says that though a copy of a certain precept, issued out of this honorable court in the above entitled cause, was delivered to it by the United States marshal for this district, the original of the said precept now upon the record of this honorable court in this cause fails to show that any property of any kind whatsoever was arrested and seized by any officer of this honorable court by virtue of the precept aforesaid.

And Palmer & Parker Company, for and in verification of
21 its allegations aforesaid, begs leave to call to the attention of this honorable court the record of the court in the above entitled cause, and it submits that the said record verifies and substantiates its allegations aforesaid.

And Palmer & Parker Company says that the said libel is in form and substance a libel in rem; that the said libel sets forth no cause of action against Palmer & Parker Company in personam; nor does the said libel pray any relief against it in personam.

And Palmer & Parker Company says that if the United States of America has any claim against it in the premises, such claim must, under the rules of law and pleading in this honorable court obtaining, be enforced against it by an action in personam.

And Palmer & Parker Company denies that it is in any wise a party to this cause, and says that in this cause this honorable court has no jurisdiction over it.

Wherefore Palmer & Parker Company prays that the said motion be denied.

PALMER & PARKER CO.,
By GORDON PARKER,
Vice President.

THOMAS HUNT,
GASTON, SNOW, SALTONSTALL & HUNT,
Proctors.

[*Duly sworn to by Gordon Parker, jurat omitted in printing.*]

22 In United States District Court

Order granting motion to file answer

Nov. 17, 1922

On the 17th day of November, A. D. 1922, it was ordered by the court, the Honorable Elisha H. Brewster, district judge, sitting, that the motion that respondent file an answer be granted and that respondent's answer be filed within ten days.

In United States District Court

Answer

Filed Nov. 27, 1922

To the District Court of the United States of America for the District of Massachusetts:

An answer of Palmer & Parker Company, a Massachusetts corporation, having its principal place of business in Boston, within this district, to the libel of the United States of America in the above entitled cause.

Whereas there is before this honorable court a motion of the libellant in the above entitled cause, whereby the libellant seeks to compel Palmer & Parker Company to pay into the registry of the court certain alleged freight, and

Whereas a motion of the libellant, whereby the libellant sought to compel Palmer & Parker Company, under penalty of default, to answer to the said libel and to interrogatories propounded by the libellant, was on November 17, 1922, allowed by this honorable court, and Palmer & Parker Company was thereby ordered to answer within ten days from that day under penalty of default.

Now, therefore, Palmer & Parker Company, appearing under compulsion and by reason of the aforesaid order, and so appearing and protesting that it in no wise comes before this honorable court of its own free will and accord, Palmer & Parker Company, by way of exception unto the libel and unto the motions aforesaid, answers and shows cause why said motion to pay alleged freight into the registry of the court should be denied; why said order to answer should be vacated; and why the libel should be dismissed.

And in order that this honorable court may be more fully informed as to certain matters imperfectly and partially set forth in the libel, Palmer & Parker Company, upon knowledge, information and belief, affirmatively alleges and articulately propounds as follows:

1. That the United States of America was, and still is, the owner of the S. S. "Mount Shasta," as set forth in article 1 of the
23 said libel, Palmer & Parker Company in no wise denies, but says that it had no notice or knowledge of the said ownership of the said vessel at any time prior to the filing of the libel.

2. That as to the allegations contained in Articles 2, 3, 4, 5, and 6 of the libel that a certain bare-boat or demise charter was on or about May 19, 1920, entered into by the United States of America acting through the United States Shipping Board and the United States Shipping Board Emergency Fleet Corporation, whereby the United States of America did demise and charter the said S. S. "Mount Shasta" unto the Mount Shasta Steamship Company and/or Victor S. Fox & Company, agents, for a period of thirteen months, are true, but Palmer & Parker Company says that it was in no wise a party to said demise charter, nor had it at the times mentioned in the libel any knowledge of the execution or existence of such document, nor was it a party thereunto. And Palmer & Parker Company says that the libel in fact contains no allegation that Palmer & Parker Company was in any wise a party thereto or had any knowledge thereof.

3. That, as to certain provisions contained in, and facts relating to, said demise charter and the original execution thereof, Palmer & Parker Company says:

(a) That said demise charter was drawn and devised by employees and counsel of the United States Shipping Board and the United States Shipping Board Emergency Fleet Corporation, and was, pro forma, known as "the standard form charter sales agreement," and that said standard form charter was in that transaction used pro forma and without material variation, and that said demise charter is, therefore, a document drawn and devised by the libellant and said demise charter is, as to each and every one of the terms,

covenants and conditions embodied therein, to be strictly construed against the libellant.

(b) That said demise charter, as is alleged in Article 5 of the libel, contained the following provision:

"The owner shall have a lien upon all cargoes and all sub-freights for any amount due under this charter-party,"

but that paragraph 10 of said demise charter gave unto the libellant the right, in case of default of said demise charterer, to "withdraw the said vessel from the service of the charterer."

24 (c) That by virtue of the terms of said demise charter, and by reason of the delivery of said vessel thereunder the said demise charterers, as alleged in article 6 of the libel, the lawful possession and control of said vessel passed to said demise charterers, and said demise charterers thereby became owners of the said vessel pro hac vice; and as to all parties dealing, without notice and in good faith, with said vessel and/or said demise charterers thereafter during the term of said demise charter, said demise charterers were owners of said vessel and the libellant was without right, title, or interest in the premises, save and unless said demise charterers being in default, the libellant, upon said default, withdrew the said vessel from employment under said demise charter, and repossessed itself thereof.

4. That Palmer & Parker Company says of that charter-party of affreightment declared upon in article 7 of the libel:

(a) That it entered into a charter-party of affreightment covering the said S. S. "Mount Shasta" for one voyage from ports on the Gold Coast, West Africa, to Boston, for the carriage of a cargo of mahogany logs, and the said charter-party of affreightment was entered into on or about July 14, 1920, and was executed by Palmer & Parker Company and by Victor S. Fox & Company, Agents; and Palmer & Parker Company attaches hereto a copy of said charter-party of affreightment marked "Schedule A," and begs leave to refer thereto.

(b) That immediately preceding the execution of the said charter-party of affreightment, Palmer & Parker Company, being in need of tonnage, were informed by New York ship brokers that a certain steamship, by name "Mount Shasta," was at that time in European waters and was in position and prompt for August loading at ports of the Gold Coast, West Africa, and open for fixture.

(c) That upon the naming of said S. S. "Mount Shasta" to it, Palmer & Parker Company having assured itself of the insurability, position, size, and type of said vessel, did then charter said vessel without inquiry as to ownership, nor was any inquiry thereof incumbent upon it according to the custom of the trade among merchants and shipowners prevailing; nor did Palmer & Parker Company then, or at any time mentioned in the libel, know of the

25 existence of the Mount Shasta Steamship Company or that it had any interest in the premises, as is declared in the amended libel.

(d) That Palmer & Parker Company refers to Schedule A hereof and says that paragraph 8 thereof provides as follows:

"Vessel to have a lien upon the cargo for all freight, dead-freight, and demurrage, and all and every other sum or sums of money which may become due the vessel under this charter."

And Palmer & Parker Company says that any right of lien arising out of said transaction of affreightment, to which it is a party or by which it may be bound, must arise out of, and exist by virtue of paragraph 8 aforesaid; and that said paragraph 8 limits and defines the liability of lien of Palmer & Parker Company in the premises, and that it is not, and can not be, otherwise bound.

5. That Palmer & Parker Company says of the reporting of the said S. S. "Mount Shasta" under the said charter-party of affreightment, the lading thereof, and the voyage thereof to the United States:

(a) That the said vessel arrived at the port of Axim, Gold Coast, West Africa, on August 7, 1920. And Palmer & Parker Company calls the attention of this honorable court to Article 8 of the libel, wherein the libellant alleges that said demise charterers were in default unto the libellant on August 1, 1920. And Palmer & Parker Company says that upon that day and the day succeeding the said S. S. "Mount Shasta" was at the port of Gibraltar, and that said vessel did thereafter proceed to said port of Axim, and that said vessel entered upon her employment under said charter-party of affreightment subsequent to the default of said demise charterer, and that the said vessel was not bound by said charter-party of affreightment at the time of said default, but though, as the libellant alleges, said demise charterer was then in default, the libellant did allow said vessel to remain in the employment of said demise charterer and after said default did said vessel load her cargo. Nor did the libellant then, or at any time in the libel mentioned, deny the right, title, or interest of the said demise charterer in the premises.

(b) That said vessel, being laden, did upon September 19, 1920, sail from said port of Axim bound for the port of Boston, but said demise charterer did fail in its duty to Palmer & Parker Com-
26 pany as to seaworthiness of said vessel and her fitness for her voyage, and the said demise charterer did also fail properly to disburse said vessel thereafter, and said vessel did repeatedly deviate and did for a long time lie at the ports of Freetown, Africa; St. Vincent, Cape de Verde Islands; Dakar, Africa, and at Bermuda awaiting disbursements.

(c) That the libellant, though it had knowledge of the aforesaid detention, deviations and delay of said vessel, and though it had an agent, correspondent or representative at Gibraltar and at each and every one of the ports aforesaid, did fail to withdraw the said vessel from employment under said demise charter and to repossess itself thereof; nor did it undertake to disburse said vessel that she might be upon her voyage and earn freight.

6. That Palmer & Parker Company says of the arrival of said vessel at the port of Boston, and of the discharge thereof:

(a) That said vessel arrived at said port February 19, 1920, having undergone no extraordinary perils of the seas and navigation upon her voyage, but having dallied and delayed for five months in the making of a passage normally made by vessels of her type and speed, in about 30 days. And by reason of the delay aforesaid, the business of Palmer & Parker Company did suffer grievous hurt, and large losses of money were occasioned and incurred thereby.

(b) That said vessel, upon arrival, reported to Rogers & Webb, agents appointed by one George W. Sterling, receiver for said demise charterer.

(c) That the approach and arrival of said vessel was known to the libellant, who was present in Boston through its agents, the United States Shipping Board Emergency Fleet Corporation, but the libellant did not withdraw said vessel from employment under said demise charter upon said arrival at Boston.

(d) That the said vessel did discharge her cargo into lighters of Palmer & Parker Company and said discharge of the said vessel was completed March 7, 1921, but the libellant did at no time prior to the completion of discharge of said vessel assert any right, title or interest to or in the said vessel and/or the freight moneys which might be, or become, due under the said charter party of affreight-
27 ment; nor does the libellant in its libel assert that any demand was made upon Palmer & Parker Company at any time prior to the completion of discharge as aforesaid; nor in fact, does the libellant allege in its libel any demand whatsoever upon Palmer & Parker Company prior to the filing of this libel, March 23, 1921.

(e) That the libellant did not withdraw said vessel from employment under said demise charter; nor did it repossess itself thereof at any time prior to the filing of this libel, but the libellant did allow the vessel to continue and remain in the possession and control of said demise charterer and George W. Sterling, receiver thereof. And the said vessel, being so possessed and controlled, did lie in said port until June 7, 1921, upon which day the libellant did withdraw said vessel from employment under the said demise charter, and the libellant did then finally repossess itself thereof.

(f) That Palmer & Parker Company calls to the attention of this honorable court the allegations in the libel contained and says that said allegations show that said demise charterer had been and remained in default in payment of charter-hire unto the libellant for seven months and seven days prior to the arrival of said vessel at said port of Boston; and Palmer & Parker Company says that said demise charterer did thereafter continue and remain in default in payment of charter-hire to the libellant until June 7, 1921, when the libellant finally repossessed itself of said vessel; and Palmer & Parker Company says that the total period of default

of said demise charterer before repossession of said vessel by the libellant was ten months and seven days.

7. That Palmer & Parker Company especially denies that said demise charterer did perform the obligations upon it incumbent under the said charter-party of affreightment; and Palmer & Parker Company also especially denies that it is now or has ever been indebted to the said demise charterer or to any person whatsoever for freight in any sum whatsoever because of the aforesaid transaction of affreightment.

28 8. That on March 23, 1921, the libellant did simultaneously file in this honorable court, two separate libels, and said libels stand upon the docket of the court as Civil No. 1968 and Civil No. 1969, respectively; and the second of said libels is the libel in this cause, and the first of said libels is like unto the second, save that the first is against the cargo, sub-freights, charter-hire and/or sub-charter-hire of the S. S. "Mount Shasta" and said libels are both of them in rem libels in rem, and the property declared upon in each of them is alleged to be in the possession and control of Palmer & Parker Co., Charlestown, Boston, in this district; and two warrants did issue from out this honorable court, and said warrants, though several, were simultaneously served upon Gordon Parker, vice president of Palmer & Parker Co., and deputies of the United States marshal for this district did seize certain logs within the booms and yards of Palmer & Parker Company in Charlestown, and said deputies did possess themselves thereof in the name of this honorable court, and did remain in possession thereof to the hurt of Palmer & Parker Company and to the detriment of its business. And Palmer & Parker Company did thereupon communicate with its proctors, and its proctors did thereafter file appearances in this honorable court for the purpose of vacating the seizure of the property aforesaid, and in order that they might protect the interests of Palmer & Parker Company in the premises and might save it harmless from further harassment and hurt in the causes aforesaid. And for said purposes alone did the proctors of Palmer & Parker Company appear before this honorable court and said proctors did, so appearing, make claim unto the said property seized, and did move this honorable court to vacate the attachment aforesaid. And this honorable court did, after a full hearing, determine that the seizure aforesaid was illegal, unauthorized and contrary to the rules and course of practice in this

29 honorable court in like causes obtaining, and warrant did issue from out this honorable court whereby the said property was restored unto Palmer & Parker Company.

9. That Palmer & Parker Company refers to article 7 of the libel and to the allegations therein contained, but more particularly to the concluding cause thereof which alleges "that said sum is now in the hands and possession of said Palmer & Parker Co." And Palmer &

Parker Company also refers to that motion now before this honorable court whereby the libellant invokes the power of this honorable court to compel Palmer & Parker Company to pay into the registry of the court, said moneys so alleged to be in the hands and possession of Palmer & Parker Company. And Palmer & Parker Company says:

(a) That it is not within the power of the libellant to transmute an alleged debt or disputed chose-in-action into a sum certain or fund designate by the mere allegation "that said sum is now in the hands and possession of said Palmer & Parker Co." and that said allegation is in no wise a statement of fact made upon knowledge, information, and belief, but said allegation is a mere fiction of pleading and an abuse of the rules of pleading in causes of admiralty and maritime jurisdiction in this honorable court prevailing.

(b) That this honorable court, after hearing, has in Civil No. 1968 found that the aforesaid cargo of logs was deliverd to Palmer & Parker Company without reservation of lien and under no bond or stipulation for the payment of freight. And in verification hereof, Palmer & Parker Company refers to the record of this honorable court in Civil No. 1968.

(c) That there was not, at the time of the filing of this libel, nor was there at any time thereafter, nor is there now, in the hands and possesson of Palmer & Parker Company any sum of money or any fund to which the libellant may in any wise lay claim, or any property capable of seizure and arrest by process issuing from out this honorable court in the above entitled cause, or any property or other proceeds of property which is in any wise attached to or bound by this proceeding in rem.

(d) That the libellant may not invoke admiralty rule 37 to assist it in maintaining the allegations in its libel contained by creating out of the general property of Palmer & Parker Company a fund to satisfy the libellant, and to confirm, establish and validate the libel now before this honorable court, to the further impairment of the capital of Palmer & Parker Company, and to the increase of the pecuniary loss already suffered by Palmer & Parker Company by reason of the transaction of affreightment aforesaid.

Therefore, Palmer & Parker Company says that this honorable court has no jurisdiction in the premises and ought not to proceed to order Palmer & Parker Company to pay into the registry of the court the alleged moneys aforesaid.

10. That Palmer & Parker Company refers to the motion of the libellant allowed by this honorable court on November 17, 1922, whereby Palmer & Parker Company was ordered to answer to the libel and the interrogatories propounded unto it by the libellant, by reason of which motion and order Palmer & Parker Company is now before this honorable court. And Palmer & Parker Company says:

(a) That the appearance of its proctors which stands upon the record of this honorable court whereof the libellant seeks to avail

itself was filed under the circumstances and conditions set forth in article 8 hereof, and that the purpose of the aforesaid appearances having been accomplished by the warrant of this honorable court thereafter issued in Civil No. 1968, the said appearance in this cause was at no time thereafter perfected by the making of a claim or by the filing of any bond or stipulation for costs or otherwise in this cause.

(b) That this libel is in form and substance a libel in rem; that said libel sets forth no cause of action against Palmer & Parker Company in personam, nor does said libel pray any relief against Palmer & Parker Company in personam, and if the libellant has any claim against Palmer & Parker Company in the premises such claim must, under the rules of law and pleading in this honorable court in cause of admiralty and maritime jurisdiction obtaining, be enforced against it by an action in personam brought by Victor S. Fox & Company or its privies.

(c) That no porperty seized and arrested by process issuing
31 from out this honorable court in this cause is now within the custody of this honorable court; nor is any fund or sum of money now i nthe hands and possession of Palmer & Parker Company now or at any time due to said demise charterer or to any person whatsoever; nor is Palmer & Parker Company before this honorable court as a claimant in this cause; nor has process in personam issued unto it whereby it has been made defendant to a proper proceeding in personam.

Therefore, Palmer & Parker Company says that this libel is in form and contents a libel in rem, and that no action can be maintained against Palmer & Parker Company in the premises in the suit of a libellant who seeks to proceed against Palmer & Parker Company in personam, but after the manner of proceedings in rem, and that no property or res being now within the custody of this honorable court or within its jurisdiction or even in existence in this cause, this libel in rem has become, and is, a nullity, and this cause is, according to the rules of law and practice in causes of admiralty and maritime jurisdiction obtaining, coram non judice.

Therefore, Palmer & Parker Company says that this honorable court has no jurisdiction of any fund or res and ought not to proceed to hear and adjudicate this cause or to compel Palmer & Parker Company to answer the libel and the interrogatories propounded to it by the libellant.

11. That Palmer & Parker Company refers to article 10 of the libel and says that the general maritime law gives to shipowners no lien upon freights and/or subfreights earned by a vessel while within the possession and control of a demise charterer who has entered into, and remains in, possession and control of such vessel under a demise charter like that demise charter declared upon by the libellant; nor

does any such lien exist by virtue of any Federal statute or any local statute within this district obtaining.

Therefore, Palmer & Parker Company, says that this honorable court has no jurisdiction and ought not to proceed to enforce
32 the alleged lien declared upon in the libel, there being no true lien declared upon in the libel nor any property designated by the libel to which said alleged lien can attach.

12. That all and singular the premises are true and in verification thereof, if denied, Palmer & Parker Company begs leave to refer to the record of this honorable court and to the exhibits, depositions and other proofs to be by it exhibited in this cause.

Wherefore, Palmer & Parker Company prays:

That this honorable court deny the aforesaid motion to compel it to pay the alleged moneys aforesaid into the registry of the court;

That this honorable court vacate the aforesaid order of November 17, 1922, that Palmer & Parker Company answer the libel and the interrogatories therewith propounded;

That this honorable court pronounce against and dismiss the said libel and to condemn the libellant in costs; and otherwise right and justice to administer in the premises.

PALMER & PARKER COMPANY,
By GORDON PARKER,
Vice President.

THOMAS HUNT,
GASTON, SNOW, SALTONSTALL & HUNT,
Proctors.

[*Duly sworn to by Gordon Parker. Jurat omitted in printing.*]

33 SCHEDULE A

Exhibit to answer

Steam. Cable Address Broshoor, New York. Liebors. Watkins. Scotts. Codes: A. B. C. & Improved Western Union

BROAD STEAMSHIP AND NAVIGATION CO. INCORPORATED,
STEAMSHIP AND CHARTERING AGENTS,
50 Broad Street, New York.

This charter party, made and concluded upon in the city of New York, July 14, 1920, between Victor S. Fox & Company, agents, of the S. S. "Mount Shasta" of ——— of the measurement of 3,012 tons net register or thereabouts, now trading ——— of the first part and Palmer & Parker Company, merchants, of Boston, Mass., of the second part.

Witnesseth that the said party of the first part agrees on the freighting and chartering of the whole of the said vessel (with the exception of the cabin) and necessary room for the crew and the

storage of provisions, sails, fuel, and cables) or sufficient room for the cargo hereinafter mentioned, unto said party of the second part for a voyage from three ports, Gold Coast, West Africa, Half Assinie, Axim, and Secondi, to Boston, Mass. Vessel to discharge at berth designated by charterers, where she may always safely lie afloat. Vessel to pay port charges, at only one loading port or so near thereto as she can proceed with safety and there deliver her cargo on the following terms:

1. The said vessel shall be tight, staunch, strong, and every way fitted for such a voyage and receive on board during the aforesaid voyage the merchandise hereinafter mentioned; and no goods or merchandise shall be laden on board otherwise than from the said party of the second part, or agent.

2. The said party of the second part doth engage to provide and furnish to the said vessel a full and complete cargo of round and square mahogany logs on and under deck, and to pay to said party of the first part, or agent, for the use of said vessel during the voyage aforesaid ($25) twenty-five dollars per ton of 2,240 pounds, payable in United States currency or its equivalent, fifty (50%) per cent of the estimated amount of intake weight of cargo loaded at loading ports, is to be prepared in New York (said prepaid freight to be considered due and earned and irrevocable, vessel and or cargo lost or not lost) upon receipt of cable advice from the master that the vessel is loaded with the number of tons aboard.

All freight and other charges payable in U. S. gold coin or its equivalent free of discount or commission.

3. The act of God, restraint of princes and rulers, the country's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation of what nature and kind soever during the said voyage, riots, strikes, fire, floods or any extraordinary occurrence beyond the control of either party, always mutually excepted.

4. It is agreed that the lay days for loading and discharging shall be as follows: Commencing from the time the captain reports his vessel ready to receive or discharge cargo; berth available or not, logs to be furnished alongside and slung as fast as vessel can
34 load and stow in suitable hours and weather, Sundays and holidays excepted; for discharging, cargo to be received as fast as vessel can deliver in suitable hours and weather, Sundays and holidays excepted. Loading and discharging to be for account of steamer. Steamer's obligation to cease when logs are discharged on wharf or wherever designated by charterers.

5. Also, that for each and every day's detention by default of said party of the second part, or agent, ($1,500) fifteen hundred dollars per day, day by day, shall be paid by the said party of the second part, or agent, to the said party of the first part, or agent.

6. The cargo or cargoes to be received and delivered alongside the vessel at such wharf or place as charterers or their agents, may designate, where she can load and discharge, always safely afloat, within reach of her tackle; and lighterage, also extra lighterage and wharf-

age, if any, at the risk and expense of the cargo. Lay days not to commence before July 25th, 1920. Charterers have the option of cancelling this charter party should vessel not be at loading port on or before August 25, 1920. Vessel to be free of wharfage at loading and discharging port, logs to be shipped weighing over five (5) tons except at master's option.

7. The bills of lading to be signed without prejudice to this charter, but at not less than chartered rates.

8. Vessel to have a lien upon the cargo for all freight, dead freight, and demurrage, and all and every other sum or sums of money which may become due the vessel under this charter.

9. It is also mutually agreed that this shipment is subject to all the terms and provisions of, and all the exemptions from liability, contained in the act of Congress of the United States, approved on the 13th day of February, 1893, and entitled "An act relating to navigation of vessels, etc." Seaworthiness warranted only so far as ordinary care can provide, and owners are not liable for loss, detention or damage arising from latent defects existing at the time of sailing. General average, if any, to be settled according to York-Antwerp rules of 1890 and Antwerp rule of 1903, or the local custom of the port of New York, at owner's option.

If the owners shall have exercised due diligence to make the vessel in all respects seaworthy, and to have her properly manned, equipped, and supplied, it is hereby agreed that in case of danger, damage, or disaster, resulting from accident or fault or errors in navigation, or in the management of the vessel, or from any latent or other defect in the vessel, or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage—provided the defect or the unseaworthiness was not discoverable by the exercise of due diligence—the shippers, consignees, or owners of the cargo shall, nevertheless, pay salvage, and any special charges incurred in respect to the cargo, and shall contribute with the owners in general average to the payment of any sacrifices, losses, or expenses of a general average nature that may be made or incurred, for the common benefit, or to relieve the adventure from any common peril, all with the same force and effect, and to the same extent, as if such accident, danger, or damage or disaster, had not resulted from, or been occasioned by, faults or errors in navigation, or in the management of the vessel, or any latent or other defect or unseaworthiness.

10. A commission of one and one-quarter per cent. on the amount of this charter, renewals or duplications and demurrage payable by vessel and/or owner on the signing of this charter party, ship lost or not lost, charter cancelled or uncancelled to Broad Steamship & Navigation Co. Inc.

11. To the true and faithful performance of all and every of the foregoing agreements, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators, and assigns, each to the other, in the penal sum of estimated amount of freight.

In witness whereof we hereunto set our hands the day and year first above written.

VICTOR S. FOX & COMPANY, INC.,
Agents,

(Signed) By GEORGE W. BLAKELEY,
Vice President.

Witness:

Vice President.

(Signed) PALMER & PARKER COMPANY,
By WM. I. PALMER, *Treas.*

Witness:
WILLIAM W. SLACK.

It is hereby understood and agreed that lay days for discharging, if required, shall not commence until forty-eight (48) hours after captain reports vessel ready to discharge cargo.

It is also hereby agreed and understood that charterers will establish a letter of credit, upon signing charter party with a New York bank for the balance of the freight to be payable upon the out-turn weight of the cargo, as agreed upon by both parties.

Also at the same term, to wit, November 29, 1922, said cause was set down for hearing and heard in part by the court, the honorable, James M. Morton, Jr., district judge, sitting.

In United States District Court

Answer of Palmer & Parker Co. to interrogatories.

Filed December 1, 1922

1. Yes. A copy of this charter is annexed to the answer of Palmer & Parker Co.

2. A cargo mahogany logs was loaded under said charter-party and was, after months of delay, brought to Boston in a worm eaten and damaged condition, in violation of the provisions of this charter party rather than "by virtue of them."

3. We did receive a cargo of 2,247 logs, in the condition stated above, about 3,615 tons of them.

4. $25 per ton of 2,240 pounds.

5. The charter-party provided for the payment of $1,500 per day for each and every day's detention of the vessel by default of the charterer.

6. If "agreed to" means by a legal and valid agreement, the answer is—we say no such agreement was made. A purported agreement in writing as to demurrage in Africa which, we say, was obtained by duress and fraud, and is invalid, was signed in
36 Africa by the master of the vessel and one Sawyer, an agent of Palmer & Parker Co. for some purposes. It is hereto annexed, endorsed upon the bill of lading.

7. Yes, a copy is annexed.

8. Yes. As provided in said charter-party, 50% of the estimated amount of freight payable upon telegraphic advices of sailing of

vessel, the sum of $52,500, erroneously estimated as 50% of said amount, was paid to Victor S. Fox & Company on or about September 2, 1920. Additional sums amounting to £4,347-1-2 sterling were paid during the voyage, the amount of which, in United States money, depends upon varying rates of exchange and costs of cable transfers. We cannot say that any of these payments were "freights agreed under the said charter-party". We say they amounted to much more than was earned or due under the agreements of the charter-party, and that large sums were paid before the time agreed upon.

9. This has been already answered under 8.

10. No.

11. See last answer.

PALMER & PARKER CO.
By F. D. SAWYER, *President.*

THOMAS HUNT,
GASTON, SNOW, SALTONSTALL & HUNT,
Proctors.

Exhibit C to answer of Palmer & Parker

Bill of lading

Shipped in good order and condition by R. D. Sawyer of Axim, West Africa, in and upon the tight, staunch, and strong steamer called the "Mount Shasta" whereof A. Kuipers is master for this present voyage and bound for Boston, Mass., U. S. A. with liberty to call at any ports in any order, to sail without pilots and to tow and assist vessels in distress and to deviate for the purpose of saving life and property.

Two thousand two hundred and forty-four (2,244). (Seccondee, 1,126 logs; Axim, 1,118 logs.) Logs of mahogany.

Said to contain two million two hundred and twenty-six
37 thousand one hundred and ninety-five (2,226,195) feet more or less, which are to be delivered in like good order and condition at the said port of Boston, Mass., U. S. A.

The act of God, restraint of princes and rulers, perils of the sea excepted. Also fire, barratry of the master and crew, pirates, collision, strandings, and accidents of navigation or latent defects in, or accidents to hull and/or machinery, and/or boilers always excepted even when occasioned by the negligence, default, or error of the pilot, master, mariners, or other persons employed by the shipowner or for whose acts he is responsible not resulting, however, in any cases from want of due diligence by the owner of the ship or by the ship's husband and master.

Unto Palmer & Parker Co., 103 Medford St., Charlestown, Boston, Mass., U. S. A., or their assigns, he or they paying freight as per charter party dated the 14th day of July, 1920, all the terms and exceptions contained in which charter party are herewith incorporated.

General average payable according to the York-Antwerp Rules, 1890.

In witness whereof the master of the said ship hath signed two bills-of-lading all of this tenor and date, any one of which being accomplished, the others to be void.

Dated at Axim the 19th day of September, 1920.

(Signed) A. KUIPERS, *Master.*

(Of these logs are three hundred and seventy-three loaded on deck.)

(s.) A. K.

50% estimated amount intake weight cargo loaded at loading ports to be prepaid in New York upon receipt of cable advice from master stating vessel loaded and number of tons on board. 50% collectable on delivery of cargo.

Without prejudice to charter party dated 14th July 1920.

38 Demurrage incurred at loading ports eight days and six-tenths of a day (8.6), vessel has lien upon the cargo for this demurrage which is not paid at loading ports.

In this demurrage is not included shifting time as follows:

	Time used d	h	m
Axim-Secondee:			
Leaves Aug 19th 8.30 p. m., arrives Aug 20th 6.53 a. m.		10	23
Secondee-Axim:			
Leaves Aug 28th 7.15 p. m., arrives Aug 29th 9.57 a. m.		14	12
Axim-Secondee:			
Leaves Sep 8th 11.20 p. m., arrives Sep 9th 8.20 a. m.		8	55
	1	9	30

question whether this shifting time is demurrage to be decided in Boston.

The usual running hours between the ports by steamers being six.

The total amount of ship's disbursements is £4,347 1 2 as per statement endorsed.

(Measurements and description unknown. Condition unknown.)

(s) A. K.

[Duly sworn to by F. D. Sawyer jurat omitted in printing.]

39 In United States District Court

Minute entries

This cause was thence continued to the December term, A. D. 1922, when, to wit, December 5, 1922, this cause came on to be further heard and was fully heard by the court, the Honorable James M. Morton, district judge, sitting as foresaid.

This cause was thence continued under advisement from term to term to the June term, A. D. 1923, when, to wit, July 2, 1923, an opinion of the court was announced, dismissing libel.

This cause was thence continued from term to term to the December term, A. D. 1924, when, to wit, February 16, 1925, a final decree was entered.

On the 16th day of March, A. D. 1925, it was ordered that the above mentioned final decree, entered on February 16, 1925, be vacated.

In United States District Court

Final Decree

March 17, 1925

MORTON, J.—This case came on to be heard at the December term, 1922, and was argued by counsel, and upon facts proven and arguments, and upon mature deliberation, it is now, to wit, March 17, 1925, ordered, adjudged, and decreed that the libel in said cause be, and do stand, dismissed with costs for Palmer & Parker Co., respondents, taxed at $.....

By the Court:

JAMES S. ALLEN, *Clerk.*

In United States District Court

Minute entry of order allowing appeal

From the foregoing final decree, the United States of America, libellant, claims an appeal to the Supreme Court of the United States, and said appeal is allowed accordingly.

40 In United States District Court

Opinion

July 2, 1923

MORTON, J.—This is a libel by the United States as owner of the steamship "Mount Shasta," against certain sub-freights alleged to be due to her. Palmer & Parker Company, from whom, as the libel alleges, the sub-freights in question are due, has appeared to deny that allegation and the jurisdiction of the court; and the case has been heard only upon the question of jurisdiction. The facts on this issue are as follows:

The "Mount Shasta" is a Shipping Board vessel which, on 19 May, 1920, was chartered under the usual charter-sale form to the Mount Shasta Steamship Company. The charter provided that, "The owner shall have a lien upon all cargoes and all sub-freights for any amounts due under this charter party."

Under date of 14 July, 1920, the charterer, through its agents Fox & Co., made a cargo-charter of the steamer to Palmer & Parker Company, of Boston, for a voyage to the Gold Coast, West Africa, for mahogany logs, the Palmer & Parker Company agreeing to furnish a full cargo and to pay a stipulated freight. By this sub-

charter, fifty per cent of the estimated freight was payable in New York upon advice from the master that the cargo had been loaded.

The steamer proceeded to Axim, on the Gold Coast, and at that port and Secondi near by she loaded a cargo. The advance freight was paid, and she began her homeward voyage. She was greatly delayed by the failure of the charterer (by which I mean the Mount Shasta Steamship Company and its agents, Fox & Co.) to remit funds with which to pay for necessary coal, cleaning the hull, and repairs to the machinery; so that the voyage instead of taking about thirty days, as it ought to have done, was not completed for about five months. This delay was caused entirely by the fault of the charterer; the cargo-owner was in no way responsible for it. The cargo-owner from time to time made advances to the master to enable the steamer to proceed, although it was under no obligation to do so.

The Government contends that there is due to the steamer under the cargo-charter about $37,000 freight money and $12,000 demurrage; and that by the terms of its charter it is entitled
41 to maintain a suit in rem against these moneys in the hands of Palmer & Parker Company. Palmer & Parker Company, on the other hand, contend that the steamer was unseaworthy and that this defect and deviation and delay caused damage to an amount largely in excess of the unpaid freight money; that no freight money is due; and that there is therefore no res and no basis of jurisdiction.

It should be noticed that the present proceeding is not against Palmer & Parker Company, nor against the cargo, which has in effect been delivered clear of lien. It is not a proceeding to which either the vessel, or her charterer, or the cargo-owner is a party. It is, as has been said, a libel in rem by the owner against freight money alleged to be due the vessel from Palmer & Parker Company.

I assume, as contended by the libelant, that freight-money due and payable constitutes a res of which an admiralty court has jurisdiction; but to have that effect the freight-money must be actually due and liability for it must I think either be admitted by the person charged, or must be so clear and obvious as to leave no room for bona fide denial. The mere assertion that freight is due from a certain person, denied in good faith by the party charged, does not, it seems to me, create a res within the jurisdiction of the admiralty court. Such a claim might be made the basis of a suit. But a claim is not a res in this sense. A suit of this character is basically different, as was recently pointed out in The Yankee Blade, 19 How. 82 (cited in Kaisha v. Pacific Export Co., U. S. Sup. Ct., Feb. 1, 1923), from a proceeding to enforce a disputed claim or garnishee process. The res is in the nature of a fund in controversy. It must exist when the suit is begun or there is no foundation of jurisdiction. And the court can not assume that freight money is due in order to draw to itself jurisdiction to determine whether that assumption is correct.

42 No case in admiralty which throws much light on the question has come to my attention. In American Steel Barge Company v. C. & O. Coal Agency, 115 F. R. 669, relied on by the libellant, there seems to have been no question as to the freight being due. There is, however, a rather close analogy in the jurisdiction of the bankruptcy court over summary proceedings brought by a trustee to recover in the hands of a third person property alleged to belong to the bankrupt estate. If the ownership is conceded to be in the estate summary process lies; and it also lies if the denial of the estate's title is obviously unfounded and colorable. But if the possessor of the property claims to own it in good faith, that is the end of summary jurisdiction. In re Tarbox, 185 F. R. 985. There is a suggestion of what amounts to the same practice in the opinion in the American Steel Barge Co. case (p. 674).

The general appearance by Palmer & Parker Company did not under the facts disclosed amount to an admission that there was such a res and that consequently the court had jurisdiction. See The Berkely Deas v. Berkley, 58 F. R. 920. Nor is the mere fact that goods have been transported and compensation earned for that service necessarily sufficient to establish that fact. Freight money in a proceeding of this character is the sum clearly and indisputably due to the vessel from the cargo owner or consignee when the libel is filed. Snow v. Carruth, 1 Sprague (Mass. D. Ct.) 324.

The Government's only right in the matter rests on the provision in its charter-party to the Mount Shasta S. S. Co. that, "The owner shall have a lien upon all cargoes and all sub-freights for any amounts due under this charter-party. With nothing but this to go on, the Government is in effect trying to cut in ahead of both the vessel and her charterer, and to compel the cargo-owner to pay to its sums which could not be recovered by either of the others—the result being (if the Government's position is sustained) that the cargo owner must pay to it the entire freight, although having suffered heavy loss by the bad condition and mismanagement of the vessel, and be remitted for reimbursement to a claim against a bankrupt concern into whose hands the Government placed
43 her. The Government's rights rest on the charter party and must be worked out through the person with whom the Government contracted. In the opinion in the American Steel Barge Co. case, supra, it is said that "The libellant holding a lien on sub-freight becomes subrogated to all the remedies of the charterer" (p. 674). If neither the steamer nor her charterer have any lien in respect to these freights, the Government has none. Vane v. A. M. Wood & Co., 231 F. R. 353, 355. The delivery of the cargo terminated all maritime liens upon it. The controversy between the vessel and her charterer on one side, and the cargo owner on the other, can be tried out in several different ways; but it can not be tried out in a suit like the present proceeding to which none of them are parties.

I have no doubt that Palmer & Parker Company are acting in entire good faith in denying that anything is due from them to the steamer, and in asserting that, on the contrary, they have a claim against her substantially in excess of all sums claimed to be due as freight and demurrage. It is unnecessary to discuss the other points argued. I find and rule that no case is shown within the jurisdiction of this court, and for that reason alone an order may be entered dismissing the libel.

In United States District Court

Petition for appeal

Filed March 21, 1925.

To the Honorable James M. Morton, Jr., Judge of the United States District Court for the District of Massachusetts:

Now comes the libellant and, feeling himself aggrieved by the final decree of this court entered on the 17th day of March, hereby prays that an appeal may be allowed to him from the said decree to the Supreme Court of the United States, and, in connection with this petition petitioner presents his assignment of errors.

44 Petitioner further prays that an order of supersedeas may be entered herein pending final disposition of the case.

HAROLD P. WILLIAMS,
United States Attorney.
LAURENCE P. CURTIS,
Second Assistant U. S. Attorney.

Petition for appeal allowed:

J. M. MORTON, JR.,
U. S. District Judge.

In United States District Court

Assignments of Error

Filed March 21, 1925

To the Honorable James M. Morton, Jr., Judge of the United States District Court for the District of Massachusetts:

Now comes the libellant and in connection with his petition for appeal says that in the record, proceedings, and final decree aforesaid manifest error has intervened to the prejudice of the libellant, to wit:

(1) The court erred in holding that the freights and demurrage still unpaid by Palmer & Parker Company were not a sufficient res upon which to found a proceeding in rem.

(2) The court erred in holding that it did not have jurisdiction of the proceeding in rem brought by the libellant.

(3) The court erred in holding that the libellant did not have a lien upon sub-freight and demurrage in the hands of Palmer & Parker Company.

(4) The court erred in holding that no case was shown within the jurisdiction of the court.

HAROLD P. WILLIAMS,
United States Attorney.
By LAURENCE CURTIS,
Second Assistant U. S. Attorney.

45 In United States District Court

Judge's certificate

Filed November 18, 1925

The District Court of the United States for the District of Massachusetts hereby certifies to the Supreme Court of the United States, in accordance with section 238 of the Judicial Code as amended, that the judgment of dismissal herein is based solely on the ground that the sub-freights alleged to be due do not constitute a sufficient res to support an action in rem, and that therefore the case does not come within the admiralty jurisdiction of this court.

JAMES M. MORTON, JR.
United States District Judge.

NOVEMBER 18, 1925.

46-47 [Citation in usual form showing service on John W. Lawrence omitted in printing.]

48 [Clerk's certificate to foregoing transcript omitted in printing.]

49 In United States District Court

Order enlarging time

May 9, 1925

[Title omitted.]

For good cause shown it is ordered that the time for docketing this case and filing the record thereof in the Supreme Court of the United States be enlarged to and including June 8, 1925.

J. M. MORTON, JR.,
U. S. District Judge

50 In United States District Court

Order enlarging time

June 8, 1925

[Title omitted.]

For good cause shown, it is ordered that the time for docketing this case and filing the record thereof in the Supreme Court of the United States be enlarged to and including Wednesday, July 8, 1925.

J. M. MORTON, JR.,
U. S. District Judge.

31 **In United States District Court**

Order enlarging time

July 8, 1925

[Title omitted.]

For good cause shown, it is ordered that the time for docketing this case and filing the record thereof in the Supreme Court of the United States be enlarged to and including Saturday, January 9, 1926.

JAMES A. LOWELL,
District Judge.

32 **In the Supreme Court of the United States**

Statement of points to be relied upon and designation by appellant to print the entire record filed nunc pro tunc as of Jan. 27, 1926

The United States of America will rely on the following points in brief and in oral argument on the hearing of their appeal, viz:

1. Freight moneys earned by a vessel constitute a res of which an admiralty court has jurisdiction.

2. The fact that the person in possession of the freight moneys has a claim against the vessel for cargo damage does not destroy the res.

3. The fact that the person in possession of freight moneys earned by a vessel has a claim against the vessel for cargo damage will at most reduce the amount of the res.

4. The right to freight moneys earned by a vessel for carriage of cargo exists independently of any claim for cargo damages sustained on voyage on which the freight moneys were earned.

Appellant designates the entire transcript of the record on file to be printed.

WILLIAM D. MITCHELL,
Solicitor General.

Service of a copy of the foregoing statement of points on which appellant will rely and of portions of the record to be printed acknowledged this day of February, 1926.

_____,
Counsel for Appellee.

[File endorsement omitted.]

[Indorsement on cover:] File No. 31609. Massachusetts D. C. U. S. Term No. 267. The United States of America, appellant vs. Freights, Sub-Freights, Charter Hire, and/or Sub-Charter Hire of the S. S. "Mount Shasta." Filed January 13, 1926. File No. 31,609.

Supreme Court of the United States, October Term, 1926

No. 267

The United States of America, appellant, *vs.* Freights, subfreights, charter hire, and/or subcharter hire of the S. S. "Mount Shasta"

Stipulation as to printing record

Filed March 18, 1927

By reason of certain omissions of material evidence from the record, and for the purpose of supplying the same, it is stipulated and agreed that the court, in considering the jurisdictional question certified, take all allegations of fact contained in the special appearance of the appellee, filed November 13, 1922 (R. p. 12); the special appearance and objection of the appellee, filed November 16, 1922 (R. p. 14), and the answer of the appellee, filed November 27, 1922 (R. p. 15), as having been made in good faith, and all facts purported to have been found by the court, as set forth in the opinion, as having been supported by the evidence, and by admission made in open court.

It is also stipulated and agreed that the exceptions to libel, appearing on page 5, and the answer, appearing on page 6 and continuing through page 10, shall be expunged from the record, said pleadings having been filed by inadvertence, never considered by the District Court, and included in this record by mistake.

WILLIAM D. MITCHELL,
Solicitor General for the appellant, United States of America.

GASTON, SNOW, SALTONSTREE & HUNT,
Attorneys for Palmer and Parker Company, appellee.

G. R. F.

39537——27 U. S. GOVERNMENT PRINTING OFFICE

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 267

THE UNITED STATES OF AMERICA, APPELLANT

v.

FREIGHTS, SUB-FREIGHTS, CHARTER HIRE, AND/OR Sub-Charter Hire of the S. S. "Mount Shasta"

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

OPINION OF THE COURT BELOW

The opinion of the District Court (R. 29) is reported in 291 Fed. 92.

JURISDICTION

The decree to be reviewed was entered March 17, 1925. (R. 29.) This direct appeal was taken March 21, 1925. (R. 32.) The certificate of the Judge (R. 33) is—

> that the judgment of dismissal herein is based solely on the ground that the sub-freights alleged to be due do not constitute

a sufficient res to support an action in rem, and that therefore the case does not come within the admiralty jurisdiction of this court.

The jurisdiction of this Court is based on Section 238 of the Judicial Code as it stood prior to the effective date of the Act of February 13, 1925 (c. 229, 43 Stat. 936).

QUESTION INVOLVED

The question presented for determination by this Court is as follows:

Where a charter party provides that the shipowner shall have a lien upon all cargoes and all subfreights for any amounts due thereunder and the owner files a libel in admiralty to recover such subfreights, does (1) the assertion in good faith of a counterclaim or offset for damages alleged to have been incurred by the cargo owner by a breach of the contract of carriage, equaling or exceeding the amount of unpaid freight, and or (2) a bona fide denial of liability therefor deprive the court of jurisdiction on the ground that the res thereby becomes extinguished?

STATEMENT OF THE CASE

The United States, as owner of the S. S. *Mount Shasta*, filed a libel *in rem* in admiralty in the United States District Court for the District of Massachusetts, alleging that hire in the amount of $289,680 was overdue from the Mount Shasta

Steamship Company [1] as charterers of the ship, and seeking to reach in payment thereof certain freight moneys due the latter from the subcharterer, Palmer & Parker Company (R. 1–4), and praying (R. 3–4):

> Wherefore the United States claiming a lien upon said freights, sub-freights, charter hire and/or sub-charter hire in the sum of two hundred and eighty nine thousand six hundred and eighty dollars ($289,680) now due it and unpaid as above set forth, prays that process in due form of law may issue against the freights, sub-freights, charter hire, and/or sub-charter hire of said steamship "Mount Shasta" and against all persons interested therein, and that a monition may issue against the said Palmer & Parker Company and against all other persons in interest, commanding it and them to pay the said freight money into court; that all persons interested therein may be cited to appear and answer under oath in the premises and that this honorable court may be pleased to pronounce for the aforesaid damages and costs, and for such other and further relief as to justice may appertain and as this court is competent to give in the premises.

It was alleged (R. 1) in the libel that on May 19, 1920, the vessel was demised for a period of thirteen months by a charter containing the provision that—

[1] The libel originally named Victor S. Fox & Co., Inc., as charterer. (R. 1.) A motion was filed substituting the Mount Shasta Steamship Co. (R. 11), which the court found to be the principal (R. 29).

> The owner shall have a lien upon all cargoes, and all sub-freights for any amounts due under this charter party. (R. 2.)

It was also alleged that on July 14, 1920, a subcharter was entered into with Palmer & Parker Company, of Boston, for the carriage of a cargo of mahogany logs from the Gold Coast of Africa to Boston, that the carriage was performed, and that a substantial amount of freight was due as a result. (R. 2-3.)

It was further alleged that charter hire was overdue to the amount of $289,680, and the establishment of a lien was sought against the subfreights, in the hands of Palmer & Parker Company, for the payment thereof. (R. 3.)

Upon the filing of the libel a warrant and monition issued requiring notice "to all persons concerned" and ordering the marshal, among else—

> to take said freights, sub-freights, charter hire, and/or sub-charter hire into his custody (R. 4)—

and the marshal made a return that he had given notice as directed and had served it upon Palmer & Parker Company. (R. 5.)

The United States, representing that "Palmer & Parker Company not having paid any of the said moneys into court," moved for an order to enforce the same. (R. 11.) This motion came on to be heard (R. 12), at which time the Palmer & Parker

Company filed a paper styled a "special appearance," wherein it denied—

> that there is now in its hands and possession, any sum of money or any fund to which the libellant may in any wise lay claim—

and denied—

> that it is in any wise a party to this cause and says that in this cause this honorable court has no jurisdiction over it. (R. 13.)

In opposition to a motion that the libel be taken *pro confesso* and that it be defaulted for failure to answer the libel and the interrogatories, it again appeared by a paper styled a "special appearance and objection" and set up that if the United States had any claim it should have been enforced in an action *in personam* and again denied the court's jurisdiction. (R. 14–15.) The court ordered the company to answer. (R. 15.)

In its answer Palmer & Parker Company admitted the allegations of the libel as to the ownership of the *Mount Shasta* and that she was chartered on the terms alleged. (R. 16–17.) It was conceded that the Palmer & Parker Company had chartered said vessel for the voyage from Africa to Boston. (R. 17.) Various acts of default on the part of the charterer whereby the arrival of the vessel at port of discharge was greatly delayed to the damage of Palmer & Parker Company and whereby they were obliged to make certain advances to the Captain of the ship to facilitate the voyage were charged. (R. 18–19.) At the time the

vessel arrived at Boston it was asserted that the affairs of the charterer were in the hands of a receiver. (R. 19.)

It was further alleged that, though the discharge of the cargo was completed on March 7, 1921, no demand was made by the libellant for the payment of the subfreights until the libel was filed on March 23 (R. 19) nor any attempt made to withdraw the vessel from the possession of the receiver until June.

It appeared from the pleadings—and particularly from the answers to the interrogatories propounded by libellant (R. 11–12)—that the Palmer & Parker Company paid no part of the freight earned by the vessel other than the estimated payment of 50%, or $52,500, on advice that the cargo of logs had been put aboard at loading ports in Africa (R. 26–27).

The Palmer & Parker Company denied any liability for freights (R. 20) or the existence of any basis for a proceeding *in rem* (R. 21–22) and asserted that the court was without jurisdiction to entertain the libel.

The case was heard by the District Court "only upon the question of jurisdiction." (R. 29.) From the stipulation filed and the recitals of the opinion, it appears that proof was offered and received *solely on the question of whether the defenses asserted were not merely colorable and interposed in good faith*. It is apparent that there was no

hearing of any sort on the merits. The respective claims of the parties are thus summarized by the court (R. 30):

> The Government contends that there is due to the steamer under the cargo-charter about $37,000 freight money and $12,000 demurrage; and that by the terms of its charter it is entitled to maintain a suit in rem against these moneys in the hands of Palmer & Parker Company. Palmer & Parker Company, on the other hand, contend that the steamer was unseaworthy and that this defect and deviation and delay caused damage to an amount largely in excess of the unpaid freight money; that no freight money is due; and that there is therefore no res and no basis of jurisdiction.

The court decided that there was no jurisdiction and dismissed the libel. The basis for the decision is contained in the following excerpt from the opinion (R. 30):

> I assume, as contended by the libelant, that freight-money due and payable constitutes a res of which an admiralty court has jurisdiction; but to have that effect the freight-money must be actually due and liability for it must I think either be admitted by the person charged, or must be so clear and obvious as to leave no room for bona fide denial. The mere assertion that freight is due from a certain person, denied in good faith by the party charged, does not, it seems to me, create a res within the jurisdiction of

> the admiralty court. Such a claim might be made the basis of a suit. But a claim is not a res in this sense. * * * The res is in the nature of a fund in controversy. It must exist when the suit is begun or there is no foundation of jurisdiction. And the court can not assume that freight money is due in order to draw to itself jurisdiction to determine whether that assumption is correct.

SUMMARY OF ARGUMENT

(1) The provisions of the charter party that "the owner shall have a lien upon all cargoes, and all sub-freights for any amount due under this charter party" created a lien upon the subfreights for the benefit of the shipowner which could be enforced by a proceeding *in rem*.

The libel in this case was instituted in conformity with the practice defined in the authorities and contains full jurisdictional allegations.

(2) The jurisdiction of the court attached upon the filing of the libel containing the requisite jurisdictional allegations and was perfected upon the issuance of a monition and its service upon the cargo owner, Palmer & Parker Company. Thereafter the right of the court to proceed and hear the case on the merits was not defeated by the mere filing of defensive pleadings, although presented with the utmost good faith.

The decision of the court below to the effect that a mere bona fide denial of liability for freight by

the cargo owner and the mere bona fide assertion of a coextensive counterclaim operated to extenguish the *res* and defeat the jurisdiction of the court to proceed to hear the case upon proof adduced in support of the libel and answer was error. Such a ruling is opposed to the authorities and the reasons upon which they depend for support.

(3) The analogy which the District Court attempted to draw from proceedings where a trustee in bankruptcy seeks to recover property in the possession of a third person held adversely to the estate is not well founded. It is further submitted that the reasoning of the court in other particulars in support of the decision is unsound.

(4) The decision of the court below dismissing the libel on jurisdictional grounds was error. The court should have retained jurisdiction and heard the case on the merits.

ARGUMENT

I

THE PROVISIONS OF THE CHARTER GAVE THE SHIPOWNER A VALID LIEN UPON SUBFREIGHTS WHICH COULD BE ENFORCED BY AN ADMIRALTY PROCEEDING IN REM

The provisions of the charter party that "The owner shall have a lien upon all cargoes, and all sub-freights for any amounts due under this charter party" present no novelty in shipping documents and maritime practice, and have been held to vest the shipowner with a valid admiralty lien enforci-

ble by an action *in rem*. Once the existence of the lien is conceded, the right to a remedy *in rem* is a necessary corollary upon familiar admiralty principles.

In the case of *American Steel Barge Co.* v. *C. & O. Coal Agency Co.*, 115 Fed. 669, the Circuit Court of Appeals for the First Circuit was called upon to consider the effect of substantially identical provisions in a charter party and sustained the right to proceed *in rem* directly against the subfreights.

In discussing the correct procedure in such a case, at page 674, Judge Putnam said:

> The proper remedy in admiralty, which does not have the strict regard to parties which is had by the chancery courts, is a libel, in the name of the party holding the bottomry bond, or other lien on freight, against the freight. It is not necessary to make party to the proceeding the assignor, or whomsoever has the remaining beneficial interest in the freight, as is required in equity, for the reason that the admiralty has no strict rules as to parties, and because, also, the proceeding being in rem, all the world are parties thereto. In accordance with admiralty rule 38, which only reiterates the uniform and ancient practice of the admiralty, the appropriate primary process is a monition to the holder of the bill of lading, or owner of the cargo, requiring him to pay the freight into the registry of the court. • • • The proper proceeding would have been to file a libel against the subfreight

> alone, naming the party charged with the possession thereof, who in this case was the holder of the bill of lading, or the owner of the cargo, and asking process requiring him to bring into court what would be due from him on discharge of the vessel, all as provided in admiralty rule 38. Then, if the freight according to the bill of lading had not been brought into court, or sufficient cause shown to the contrary, summary process would have issued on a supplemental libel or petition against the holder of the bill of lading, or against the cargo if the lien for freight had not been lost.

This is precisely the practice adopted by the Government in this case. It is submitted that the refusal of a cargo owner to comply with the directions in the monition and to cover the unpaid part of the freight into the registry of the court can not affect the jurisdiction of the court which had attached at the time of the filing of the libel. *Snow* v. *180¾ Tons of Scrap Iron*, 11 Fed. 517.

The doctrine enunciated in the *American Steel Barge Company* case has received universal recognition.

In *Carver's "Carriage by Sea,"* Seventh Edition, at page 930, the author says:

> A lien upon "sub-freights" for charter freight, or hire, is often expressly given. This entitles the shipowner to require payment to himself of freights which may be due to the charterer.

See also—

Freights of the Kate, 63 Fed. 707.

Bank of British North America v. *Freights, etc., of the Ansgar*, 127 Fed. 859; affirmed in 137 Fed. 534.

Larsen v. *150 Bales of Sisal Grass*, 147 Fed. 783.

Actieselskabet Dampsk. Thorbjorn v. *Harrison & Co.*, 260 Fed. 287.

Tagart, Beaton and Co. v. *James Fisher and Sons*, 9 *Asp. 381* (*Court of Appeal*)

In this case, which involved a lien on subfreights given in a time charter party to a shipowner as security for the payment to him of the hire of the vessel, Lord Halsbury said (at p. 384):

> Confining myself to the only question with which I think it is necessary to deal, I am of opinion that it is quite clear that the right—which is an important right, whether it is called a lien or is called by any other name—must be exercised at the time when there is freight to be paid. That really is the short point. If the freight has been paid the lien is gone * * *.

Lord Alverstone also said (at p. 385):

> Putting the matter in my own way, as I understand it, a lien for sub-freight in these time charters means a right to stop freight and receive freight as such, and does not mean the right to follow the proceeds into the pockets of somebody else because the money which has been so received was paid in respect of a debt due for freight.

Doubtless there is a right to hold the cargo under a stipulation in a charter such as here involved, not only as security for any amount due as charter hire, but also as security for the payment of subfreight upon which a lien is imposed.

In this connection attention is invited to the following statement by the court in *American Steel Barge Co. v. C. & O. Coal Agency Co., supra*, p. 674:

> Then, if the freight according to the bill of lading had not been brought into court, or sufficient cause shown to the contrary, summary process would have issued on a supplemental libel or petition against the holder of the bill of lading, or against the cargo if the lien for freight had not been lost.

The loss of the lien on the cargo as result of its delivery to the consignee does not affect, however, the lien upon the subfreights, which persists as long as such freights or any part thereof remain unpaid.

This is illustrated by the case of *The Sarpfos*, 1925 A. M. C. at page 137. In this case the referee in bankruptcy, whose opinion was affirmed by the District Court, said at page 143:

> The charterer, through the trustee, takes the position that the lien in favor of the owner given by the charter party was really only a lien on cargoes, and that no lien on the sub-freights was given. The charterer alleges that when the cargo was delivered at Panama to be forwarded by connecting carrier, the owner lost the lien on the cargo and on the sub-freights at the same time. The

owner claims that the lien on cargoes and on sub-freights are independent of each other; and in this opinion the undersigned referee concurs. The referee is of the opinion that whereas the lien on cargoes is possessory, a lien on freights is not. Both land and water carriers, from the earliest times, have, under the law, been entitled to a lien on cargo carried by them for the freights due to them. The lien was possessory in character and it was lost by the delivery of the cargo, unless some special agreement reserved the lien. In the case at bar it is admitted that when the cargo was delivered at Panama, to go forward by connecting carrier to destination, no lien was asserted. The trustee therefore argues that since the owner's lien on cargo was lost, the lien on the freight was also lost; but such would not seem to be the law. *Freights of the Kate*, 63 Fed. 707; *American Steel Barge Co.* v. *Chesapeake and Ohio Coal Agency Co.*, 115 Fed. 669; *Bank of British North America* v. *Freights, etc. of the Hutton*, 137 Fed. 534. The lien on freights rests on a special agreement giving it.

II

THE JURISDICTION OF THE COURT ATTACHED UPON THE FILING OF THE LIBEL CONTAINING THE REQUISITE JURISDICTIONAL ALLEGATIONS AND WAS PERFECTED UPON THE ISSUANCE OF A MONITION AND ITS SERVICE UPON THE CARGO OWNER. THEREAFTER THE RIGHT OF THE COURT TO PROCEED AND HEAR THE CASE ON THE MERITS WAS NOT DEFEATED BY THE MERE FILING OF DEFENSIVE PLEADINGS, ALTHOUGH PRESENTED WITH THE UTMOST GOOD FAITH

The District Court, having conceded "that freight-money due and payable constitutes a res of which an admiralty court has jurisdiction" (R. 30), proceeded to rule in effect that a mere bona fide denial of liability for freight by the cargo owner extinguished the *res* and defeated the jurisdiction of the court to proceed further. In this connection the court said (R. 30)—

> but to have that effect [to constitute a res] the freight-money must be actually due and liability for it must I think either be admitted by the person charged, or must be so clear and obvious as to leave no room for bona fide denial. The mere assertion that freight is due from a certain person, denied in good faith by the party charged, does not, it seems to me, create a res within the jurisdiction of the admiralty court. Such a claim might be made the basis of a suit. But a claim is not a res in this sense.

It will be observed that the denial of liability for freight in the instant case by the cargo owner did

not involve any dispute *about the carriage being actually undertaken and performed or of the existence of an agreement fixing the rate of freight therefor,* but consisted of allegations that the vessel was put to sea in an unseaworthy condition and without being adequately disbursed for the work (R. 18); that the voyage was inexcusably prolonged, whereby "the business of Palmer & Parker Company did suffer grievous hurt, and large losses of money were occasioned and incurred thereby" (R. 19), and general denials that the charterer had performed "the obligations upon it incumbent under the said charter-party of affreightment" and allegations of resulting indebtedness. (R. 20.)

We take all this to mean no more than that breaches of the contract of carriage by the charterer were asserted by the cargo owner to have caused the latter damages *which might or did equal or exceed the unpaid balance of the stipulated freight earned by the vessel and could be recouped.*

This was apparently the position taken by the Palmer & Parker Company at the hearing (R. 30):

> Palmer & Parker Company, on the other hand, contend that the steamer was unseaworthy and that this defect and deviation and delay caused damage to an amount largely in excess of the unpaid freight money; that no freight money is due; and that there is therefore no res and no basis of jurisdiction.

mere assertion of a co-extensive claim in recoupment or by set-off, when made in good faith, immediately ousts the court of jurisdiction to hear the case on the merits.

Furthermore, such a position tends to absurd and intolerable results. If it is correct, it is immaterial whether the alleged recoupment or set-off is well founded or not. It is enough that it is claimed in good faith. In that event a person in the position of the libellant would not only be deprived of all right to try out his case on the merits, but, in all cases where the claim is not *actually* well founded, he would be in the result deprived of the benefit of his contract and the property interest in the freights arising from the imposition of a lien thereon. It is submitted that the mere enunciation of such a result demonstrates the unsoundness of the decision below.

Moreover, the authorities dealing with the character of recoupment or set-off in admiralty proceedings clearly oppose themselves to any such results as have been reached in the court below.

In *Parsons on Maritime Law*, Vol. 2, in the chapter entitled "Of Set-Offs and Cross Libels," at page 717, it is asserted:

> If an action is brought for freight, it is held that damage done to the goods may be set off. So freight is to be deducted, if the suit is for damage done to the goods.

In *Snow* v. *Carruth*, 1 Sprague 324 (cited with approval in *Washington-Southern Navigation Co.*

v. *Baltimore & Philadelphia Steamboat Co.*, 263 U. S. 629, 637), at page 326, the court said:

> Considering the question upon principle, there seems to be no reason for not allowing this defence. The libellant claims under a contract for freight. The defence goes to the question how much, if anything, he ought to recover for services under that contract. The claim and the defence are on the same contract, and the evidence necessary in each may, to a considerable extent, be the same, as, for instance, on the question of the delivery of the goods by the libellant.
>
> It is true, there is no general doctrine of set-off recognized in the admiralty; and if the damage to the respondent be greater than the whole freight, there can be no decree against the libellants for the excess.

In *Thatcher* v. *McCulloh*, Olcott's Reports, 365, 371, the following statement was made:

> In a special action for the loss sustained because of the circuity and delay of the voyage, the freighter might undoubtedly recover damages commensurate to any injury he could prove accrued from that cause; such cross-action might probably be sustained by the merchant, notwithstanding his acceptance of the cargo. * * * I perceive no objection to adjusting the equitable rights of the parties, without double action, by allowing, by way of recoupment of freight, the amount of damages sustained by the respondent by

> means of the breach of contract of affreightment in the deviation to Key West.

Kennedy v. *Dodge*, 1 Benedict, 311: Herein, at page 315 of the opinion, the court said:

> The only remaining question is, whether the damages of the respondents, arising out of this accident, can be recouped against the claim for freight, and if there is a balance in their favor, whether it can be recovered in this suit.
>
> That the damages suffered by the respondents can be recouped from the freight money, which the libellants would otherwise recover, appears to be settled upon authority. [Citing many cases.] By way of recoupment, the respondents can, as the damages arise out of the same transaction, extinguish a portion or all the claim of the libellants.

It is true that the authorities last cited deal with actions for the recovery of freight rather than with proceedings for the enforcement of liens upon subfreights. Once it is admitted, however, that a lien has been created of which admiralty takes cognizance, it must be further conceded as a corollary that a proceeding *in rem* is a proper remedy. Indeed, it appears to be the only remedy in the absence of any privity between the person asserting the lien and a resisting claimant. We are therefore unable to discern any difference in legal effect, so far as the principle involved is concerned, between these cases and cases where an owner seeks to enforce a lien given in respect to subfreights.

We are not, however, confined to reasoning based upon analogy, because the authorities dealing with the cases of subfreight definitely establish, or at least strongly indicate, that the principles and legal results are the same. *American Steel Barge Company* v. *C. & O. Coal Agency Co.*, 115 Fed. 669; *Freights of the Kate*, 63 Fed. 707; *Bank of British North America* v. *Freights, etc., of the Ansgar*, 127 Fed. 859; *Larsen* v. *150 Bales of Sisal Grass*, 147 Fed. 783; *Actieselskabet Dampsk. Thorbjorn* v. *Harrison & Co.*, 260 Fed. 287.

Finally, it would follow, *a fortiori*, that a mere general denial of liability by the cargo owner, though made in the utmost good faith, should not in reason or on principle operate to oust the court of jurisdiction which has attached at the time the libel is filed and a monition issued directing the payment of subfreights into the registry of the court.

III

THE ANALOGY SOUGHT TO BE DRAWN BY THE DISTRICT COURT IS INAPPLICABLE AND THE REASONS ASSIGNED FOR ITS DECISION ARE UNSOUND

The court stated that "No case in admiralty which throws much light on the question has come to my attention." (R. 31.) It is then asserted that there is a—

> rather close analogy in the jurisdiction of the bankruptcy court over summary proceedings brought by a trustee to recover in the hands of a third person property alleged to belong

> to the bankrupt estate. If the ownership is conceded to be in the estate summary process lies; and it also lies if the denial of the estate's title is obviously unfounded and colorable. But if the possessor of the property claims to own it in good faith, that is the end of summary jurisdiction. *In re Tarbox*, 185 F. R. 985. (R. 31.)

We are unable to discern any analogy. We understand that the cases of which *In Re Tarbox* is a type decide no more than that where the property is claimed in good faith adversely to the trustee, the claimant is entitled to have the matter tried out in accordance with the usual practice provided for the protection and benefit of litigants in the conduct of plenary suits.

The court further asserts that—

> With nothing but this [the provision in the charter party] to go on, the Government is in effect trying to cut in ahead of both the vessel and her charterer, and to compel the cargo-owner to pay to its [sic, it] sums which could not be recovered by either of the others—the result being (if the Government's position is sustained) that the cargo owner must pay to it the entire freight, although having suffered heavy loss by the bad condition and mismanagement of the vessel, and be remitted for reimbursement to a claim against a bankrupt concern into whose hands the Government placed her.

The Government is claiming no more than the right to have this counterclaim *tried out on the*

merits. The Government complains of no more than being deprived of the right to have the matter heard on the evidence. If the counterclaim is established by proof and its amount determined by evidence, the Government will not complain of any right to recoup. As the matter stands, however, the Government is deprived of its right to recover any of the subfreight remaining unpaid, *yet its vessel may be made subject to a maritime lien for the full measure of damages alleged to have been sustained as a result of breaches in the contract of carriage.*

IV

AS A FINAL CONSIDERATION IT MAY BE DOUBTED IF THE QUESTION RAISED BY THE CARGO OWNER AND DECIDED BY THE DISTRICT COURT AS A JURISDICTIONAL ISSUE WENT TO THE QUESTION OF JURISDICTION AT ALL

It is extremely doubtful if the question as to the existence of a *res* upon which a maritime lien could attach raised any jurisdictional issue at all in a strict sense. It doubtless went to the merits of the case and the right of the libellant to recover, but these are not jurisdictional considerations. (See *Sperry Gyroscope Co.* v. *Arma Engineering Co.*, 271 U. S. 232.) It follows as a corollary that the dismissal of a libel for lack of jurisdiction solely because the respondent pleads in good faith new matter which goes to the legal merits of the libellant's claim would be error.

In the case of *The Resolute*, 168 U. S. 437, this Court, through Mr. Justice Brown, made the following pertinent observations (p. 440):

> It is true that there can be no decree *in rem* against the vessel except for the enforcement of a lien given by the maritime law, or by a state law; but if the existence of such a lien were a question of jurisdiction, then nearly every question arising upon the merits could be made one of jurisdiction. Thus, supplies furnished to a vessel import a lien only when they are sold upon her credit; and the defence ordinarily made to such claims is that they were sold upon the personal credit of the owner or charterer; but certainly it could not be claimed that this was a question of jurisdiction. The existence of a lien for collision depends upon the question of fault or no fault, but it never was heard of that it thereby became a question of jurisdiction. Salvage services, too, ordinarily import a lien of the very highest rank; but it has sometimes been held that, if such services are rendered by seamen in the employ of a wrecking tug, or by a municipal fire department, no lien arises, for the reason that the men are originally employed for the very purpose of rescuing property from perils of the sea, or loss by fire. In the case under consideration a portion of the libellant's claim arises by assignment from Tellefson, and the authorities are almost equally divided upon the question whether such assignment carries

the lien of the assignor to his assignee. Obviously these are not jurisdictional questions.

See also *Hazelwood Dock Co.* v. *Palmer,* 228 Fed. 325; *Benedict on Admiralty,* Fifth Edition, Sec. 434, and the cases cited.

CONCLUSION

It is respectfully submitted that the decision of the court dismissing the libel for lack of jurisdiction should be reversed and the case remanded for a hearing on the merits.

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MARCH, 1927.

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Supreme Court of the United States

OCTOBER TERM, 1926

No. 267

THE UNITED STATES OF AMERICA, APPELLANT,

v.

FREIGHTS, SUB-FREIGHTS, CHARTER-HIRE, AND OR SUB-CHARTER HIRE OF THE S.S. "MT. SHASTA"

BRIEF IN BEHALF OF PALMER & PARKER CO., APPELLEE

The official report of the opinion in the court below is—*"The Mount Shasta,"* 291 Fed. Rep. 92.

JURISDICTION OF THIS COURT

The grounds on which the jurisdiction of this court is invoked are as follows:

This is an appeal to this court taken by the United States from a final decree made by the United States District Court for the District of Massachusetts, sitting in admiralty, on March 17, 1925, dismissing the libel of the United States (Record, p. 29) upon the ground that the case did not "come within the admiralty jurisdiction" of that court (Record, p. 33).

From this decree the United States appealed directly to this court (Record, p. 32).

The appellee believes, and assumes, that the appeal is

based upon Sec. 238 of the Judicial Code, reading, prior to February 13, 1925, as follows:

> "Appeals and writs of error may be taken from the District Courts, including the United States district court for Hawaii and the United States district court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision . . . ."

This statute was amended by Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938, but Section 14 of that act provides that it shall not affect the right to a review of a decree entered (as this decree was) prior to the date when the act takes effect, *i.e.*, May 13, 1925.

STATEMENT OF THE CASE

THE SINGLE, FUNDAMENTAL QUESTION NOW TO BE DECIDED IS WHETHER THE DISTRICT COURT HAD JURISDICTION OF THIS CASE.

The proceeding is in admiralty and purports to be a libel *in rem* brought by the United States against the "Freights, Sub-freights, Charter Hire, and/or Sub-charter Hire of the S.S. 'Mount Shasta.'" The District Court, after hearing, made a decree dismissing the libel (Record, p. 29), and has certified that "the judgment of dismissal herein is based solely on the ground that the sub-freights alleged to be due do not constitute a sufficient *res* to support an action *in rem*, and that therefore the case does not come within the admiralty jurisdiction of this court" (Record, p. 33).

It is agreed by the appellant and appellee,—

(1) That all allegations of fact contained in the special appearance of the appellee, filed November 13, 1922 (Record, p. 12), in the special appearance and objection of the appellee, filed November 16, 1922 (Record, p. 14), and in the answer of the appellee (Record, p. 15), may be taken as made in good faith;

(2) That all facts found by the Court, as set forth in the opinion (Record, pp. 29-32), may be taken as supported by the evidence and by admissions made in open court; and

(3) That the exceptions to the libel (Record, p. 5) and the answer (Record, pp. 6-10) are to be expunged from the record as having been included in it by mistake. (See Stipulation on file, Appendix A of this brief.)

The facts found by the District Court, and set forth in the opinion (Record, pp. 29, 30) are in substance as follows:

The "Mount Shasta" was a Shipping Board vessel which was chartered on May 19, 1920, to the Mount Shasta Steamship Co., by a demise charter which contained a provision that "the owner shall have a lien upon all cargoes and all

sub-freights for any amount due under this charter party" (Record, p. 29).

Under date of July 14, 1920, the Mount Shasta Steamship Co., through its agents, Fox & Co., made a cargo-charter of the steamer to Palmer & Parker Co., of Boston, for a voyage to the Gold Coast, to bring a cargo of mahogany logs from there to Boston, the Palmer & Parker Co. agreeing to furnish a full cargo and to pay a stipulated freight. By the terms of the sub-charter, 50 per cent. of the estimated freight was payable in New York upon advice from the master that the cargo had been loaded (Record, pp. 29, 30).

The steamer proceeded to Axim, on the Gold Coast, arriving there on August 7, 1920 (Record, p. 18); and at that port and at Secondi, another port near by, she loaded a cargo of mahogany logs. One-half of the estimated freight was paid by Palmer & Parker Co. in advance, and she began her voyage to Boston. She was much delayed by the failure of the Mount Shasta Steamship Co. and its agent, Fox & Co., to provide funds with which to pay for necessary coal, for the cleaning of the hull, and for necessary repairs to the machinery—so much delayed that the voyage, instead of occupying only about thirty days, as it should have, was not completed for about five months. This delay was caused entirely by the fault of the Mount Shasta Steamship Co. and its agents. Palmer & Parker Co., the owner of the cargo, was in no way responsible for it. Palmer & Parker Co., although under no obligation so to do, made from time to time cash advances, considerable in amount, to the master, to enable the steamer to proceed on her voyage (Record, p. 30).

Palmer & Parker Co. contended that the unseaworthiness of the vessel, and her deviations and delays, had caused it damage largely in excess of the unpaid portion of the freight money to be earned, and that no freight money was due (Opinion, Record, p. 30). This contention was made in good faith (Opinion, Record, p. 32).

Other allegations of fact made in the Answer filed by the appellee (Record, pp. 12, 14 and 15) which, it is provided

by the stipulation between the parties on file, are to be taken as made in good faith, are:

That Palmer & Parker Co. did not know until after the filing of the libel that the "Mount Shasta" belonged to the United States (Record, p. 16).

That the charter from the United States Shipping Board to the Mount Shasta Steamship Co. was a bare-boat or demise charter, and that the existence of it was unknown to Palmer & Parker Co. (Record, p. 16).

That this demise charter was drawn by the employees and counsel of the Shipping Board (Record, p. 16).

That Paragraph 10 of that charter gave to the Shipping Board the right, in case of default of the demise charterer, to "withdraw the said vessel from the service of the charterer" (Record, p. 17), and that the demise charterer was in default from and after August 1, 1920 (Record p. 18).

That possession and control passed under that charter to the demise charterer (Record, p. 17).

That Palmer & Parker Co. did not in fact know of the existence of the Mount Shasta Steamship Co., or that it had any interest in the premises (Record, p. 17).

That the "Mount Shasta" was not seaworthy, or fit for the voyage from the Gold Coast to Boston, that she deviated repeatedly from her proper course, and lay for a long time at Freetown, Africa, St. Vincent, Cape de Verde Islands, Dakar, Africa, and at Bermuda, awaiting disbursements necessary to enable her to proceed upon her voyage, which disbursements the Mount Shasta Steamship Co. and its agent, Fox & Co., failed to provide (Record, p. 18).

That the Shipping Board did not assert any right or interest in the vessel, or in the freight money, until after the cargo had been discharged and delivered to Palmer & Parker Co. clear of lien (Record, p. 19).

That the United States Shipping Board did not either withdraw the vessel from employment under the demise charter, or repossess itself of her, but permitted her to remain in the possession of the Receiver of the demise charterer until after the filing of this libel, and until long after the cargo had been delivered to Palmer & Parker Co., without reservation of

lien, or any bond or stipulation for the payment of freight (Record, p. 19).

The answers to the interrogatories also contained evidence that the cargo of mahogany logs was, after months of delay, delivered at Boston in a worm-eaten and damaged condition and that, in addition to the 50 per cent. of the estimated amount of freight—which amounted to $52,500—paid by Palmer & Parker Co. to Victor S. Fox & Co. when the vessel sailed from the Gold Coast, additional sums, amounting to upwards of 4,347£ sterling, were paid by Palmer & Parker Co. on account of freight during the voyage, in order to enable the vessel to proceed upon her course (Record, p. 27).

Upon the filing of the libel, the warrant and monition issued (Record, p. 4), and were duly returned by the Marshal into the District Court (Record, p. 5).

Neither the monition nor the warrant named or mentioned Palmer & Parker Co. The Marshal's return shows that he advertised the substance of the monition in the *Boston Marine Guide* and posted a notice of it in the courthouse at Boston, and also gave a copy of it, in hand, to the vice-president of Palmer & Parker Co. He did not take into custody, seize or arrest, anything whatever, nor did he attempt to do so.

On November 7, 1922, the libellant moved that Palmer & Parker Co. be ordered to pay the freight moneys into court (Record, p. 11). On November 13, 1922, that motion was set down for hearing (Record, p. 12), and on that day Palmer & Parker Co. filed a special appearance (Record, p. 12) denying that process had issued against it in due form of law, citing it to show cause why the freight money should not be paid into court. In this special appearance it also denied that either at that time, or at the time of filing the libel, it had "in its hands and possession any sum of money or any fund to which the libellant may in any wise lay claim" or "in its hands and possession any property capable of seizure and arrest by process issued . . . in the above entitled cause," or that there was, at the time, in the custody of the

district court, "any property seized or arrested pursuant to process issuing out of this honorable court in the above entitled cause to which Palmer & Parker Co. has at any time laid claim, or now claims." This special appearance concludes with a specific denial of the jurisdiction of the District Court, and with the prayer that the motion to compel Palmer & Parker Co. to pay freights into court be denied.

The libellant's motion that Palmer & Parker Co. be ordered to pay the freights into court was never passed upon by the court. On December 5, 1922, the case came on for hearing before the district judge, and on July 2, 1923, his opinion was filed.

On March 21, 1925, the final decree was entered in accordance with that opinion, and from this final decree the libellant has appealed.

SUMMARY OF THE ARGUMENT

A. The District Court had no jurisdiction of this proceeding *in rem* because there was no "res".

B. The District Court had no jurisdiction of this proceeding because, even if there had been a "res", it was never within the custody of the Court.

C. The District Court had no jurisdiction of this proceeding for the reasons stated by it in its opinion.

ARGUMENT

The position of Palmer & Parker Co., the appellee, is,—

That the decree dismissing the libel should be affirmed:

A. Because there was here no "res" of which a Court of Admiralty could have jurisdiction in a proceeding *in rem*.

B. Because, even if there had been here such a "res", that "res" was never "within the lawful custody of the Court."

C. For the reasons stated in the opinion of the District Court.

A. THERE WAS HERE NO "RES" OF WHICH A COURT OF ADMIRALTY COULD HAVE JURISDICTION IN A PROCEEDING *in rem*.

It is important to have clearly in mind from the outset just what it was here against which the libellant purported to proceed *in rem*, and over which the court was asked to exercise jurisdiction *in rem*.

There was, on the one hand, a *chose in action*, a claim in favor of "Victor A. Fox & Co., Agents of the S.S. 'Mount Shasta'" and against Palmer & Parker Co., in the general nature of a claim for failure to perform a contract, that contract (embodied in a charter party) being an agreement to pay to Fox & Co. freight at the rate of $25 per ton of cargo.

There was, on the other hand, a contention by Palmer & Parker Co.—expressly found by the court to be made in good faith—that it was not liable for any amount whatever, and that the steamship and Fox & Co. were liable to it for much more than the "sums claimed to be due as freight and demurrage" (Record, p. 32),—for a number of reasons, which may be thus summarized:

> Because Fox & Co. had not performed its own obligations under the charter party.
>
> Because the vessel had not proved to be "tight, staunch, strong and in every way fitted for such voyage," but unseaworthy—a breach of an obligation specifically assumed by Fox & Co. in the charter party.
>
> Because Fox & Co. had not furnished the vessel with the money required to provide coal and other necessaries, and to pay for repairs needed to enable her to make the voyage.
>
> Because she had deviated and delayed, and had consumed five months in making a voyage which should have been accomplished in 30 days.
>
> Because Palmer & Parker Co.'s cargo had, after these delays, been delivered in Boston in a worm-eaten and damaged condition.
>
> Because one-half of the freight money had been paid in advance.
>
> Because further sums, amounting to some £4,347 (value in U. S. currency uncertain because of varying rates of exchange, etc.), had been paid by Palmer & Parker Co.

on account of the freights to be earned, in order to make it possible for the vessel to proceed upon her voyage. (Opinion, Answer and Answers to Interrogatories, as above.)

For two very recent and instructive decisions of a court of last resort, in cases between other parties, but arising out of this very voyage of this same vessel and these same facts, and showing the importance of these facts, see

Commercial Trust Co. v. *American Trust Co.*, 245 Mass. 166.

Commercial Trust Co. v. *American Trust Co.*, decided May 27, 1926, 256 Mass. 58.

The fundamental question of the case is,—

DOES THIS CLAIM, EXISTING UNDER THESE CIRCUMSTANCES, CONSTITUTE IN ITSELF, AND WITHOUT MORE, SUCH A "RES" AS MAY BE PROCEEDED AGAINST BY AN ADMIRALTY PROCEEDING *in rem?*

The position of Palmer & Parker Co. is that it does not.

". . . the distinction is sharply drawn between a common law action *in personam* with a concurrent attachment against the goods and chattels of the defendant, subject, of course, to any existing liens, and a proceeding *in rem* against the vessel as the debtor or 'offending thing,' which is the characteristic of a suit in admiralty. The same distinction is carefully preserved in the general admiralty rules prescribed by this court; rule second declaring that in suits *in personam* the mesne process may be 'by a warrant of arrest of the person of the defendant, with a clause therein that if he cannot be found, to attach his goods and chattels to the amount sued for'; and rule nine, that in suits and proceedings *in rem*, the process shall be by warrant of arrest of the ship, goods or other things to be arrested, with public notice to be given in the newspapers. The former is in strict analogy to a common law proceeding and is a concurrent remedy. The latter is a proceeding distinctively maritime, of which exclusive jurisdiction is given to the admiralty courts."

The "Robert W. Parsons," 191 U. S. 17 (at p. 37).

(Italics in the following quotations ours.)

"Actions *in rem* are prosecuted to enforce a right *to things arrested*, to perfect a maritime privilege or lien attaching to a vessel or cargo or both, and in which *the thing to be made responsible is proceeded against* as the real party, but actions *in personam* are those in which an individual is charged personally in respect to some matter of admiralty and maritime jurisdiction. Both the process and proceedings are different, and the appropriate decree in the one might be absolutely absurd in the other."

The "Sabine," 11 Otto, 384, 388.

"*The foundation of jurisdiction* in rem *is the taking of the vessel into the custody of the court*, and the characteristic virtue of a proceeding *in rem* is that it operates directly upon the *res* as . . . the actual subject matter of the jurisdiction. . . ."

Benedict on Admiralty, 5th Ed., Vol. I, Ch. 3, Sec. 11 (p. 16).

"Process *in rem* is founded on a right in the thing and the object of the process is to hold the thing itself. . . . The court arrests the thing for the purposes of satisfaction. *It holds its possession by its officers, and the property in contemplation of law is in the custody of the court itself.*"

Benedict on Admiralty, 5th Ed., Vol. I, Ch. 23, Sec. 297 (p. 369).

"Admiralty proceedings fall under two great classes—proceedings *in rem* and proceedings *in personam*. In the first, *the thing itself* against which the right is claimed or liability asserted *is proceeded against by name, as a contracting or offending entity, arrested or taken into legal custody*, and finally sold to answer the demand, unless its owner appears and releases it by bond or stipulation."

Hughes on Admiralty, 2d Ed. (p. 400).

"In ordinary suits of foreign attachment in the state courts, the debtor is defendant by name, and, if he appears, a personal judgment may be rendered against him; but not so in admiralty suits *in rem*, for the real defendant

there is the *vessel or other property*, and the owner appears not as defendant, but as claimant."

Hughes on Admiralty, 2d Ed. (p. 401).

"In all cases of seizure, and in other suits and proceedings *in rem*, the process, if issued and unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested; and *the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody*, etc., etc."

Admiralty Rule 10.

"All libels in instance causes, civil or maritime, shall be on oath or solemn affirmation and shall state the nature of the cause, as, for example, that it is a cause, civil and maritime, of contract, or a tort or damage, or of salvage, or of possession, or otherwise, as the same may be; *and, if the libel be* in rem, *that the property is within the district*, etc., etc."

Admiralty Rule 22.

See, also,

Cooper v. *Reynolds*, 10 Wallace, 308 (316, 317) by Miller, J.

"Jurisdiction *in rem* depends solely on the physical control of the *res* by the sovereign exercising jurisdiction. . . . The typical example of jurisdiction *in rem* is the jurisdiction of the Court of Admiralty over any vessel within the territorial waters of its sovereign."

"The Exercise of Jurisdiction *in rem* to Compel Payment of a Debt," by Prof. Joseph Henry Beale, Harvard Law Review, Vol. 27, No. 2, December, 1913.

"The foundation of jurisdiction is physical power."

Holmes, J., in *Ex parte Indiana Transportation Co.*, 244 U. S. 456, 457.

In a proceeding *in rem*, where there is no personal defendant, the "physical power" which constitutes the "foundation of

jurisdiction" must, of necessity, be "physical power over the thing proceeded against." If there be no such physical power over it, there can be no jurisdiction.

The general result of these authorities is to establish that the jurisdiction *in rem* of the admiralty is founded upon physical power over the "res," and upon the theory that the "res" proceeded against is "a contracting or offending entity," either a "debtor or 'offending thing'" (in the language of this court in the "*Robert W. Parsons*," supra, p. 11), a thing which can be "arrested" and "taken into custody," which can be fairly designated as "tangible property," or the proceeds of tangible property, and is physically within the territorial jurisdiction of the court—in the case of the district courts of the United States, "within the district."

This claim against Palmer & Parker Co., a disputed *chose in action*, falls far short of fulfilling these requirements. It is not, of course, in any sense a physical entity, but a pure abstraction, a mere intellectual concept. It cannot possibly be regarded as a "contracting entity"; such terms as "arrest" and "take into custody" can have no proper application to it; it is certainly not tangible property or its proceeds; and it cannot properly be described as being "within the district" of the court.

It is, moreover, a claim unliquidated in form, uncertain in amount, disputed in fact, and of wholly uncertain, if any, value.

It lacks, therefore, substantially all the required elements and attributes of such a "res" as may constitute the sole object of a proceeding *in rem* in a court of admiralty. It is no more such a "res" than would be a pending claim to recover damages, or compensation, for a tort.

It is submitted, with confidence, that no decision of this court, and no decision of any Circuit Court of Appeals, can be cited which holds that a claim such as this one of Fox & Co. against Palmer & Parker Co. can be proceeded against in the admiralty by means of a libel *in rem*, at least as the sole "res."

The libellant here undertook to rely in the District Court upon the opinion of Putnam, J., in *American Steel Barge Co. v. Chesapeake & Ohio Coal Agency Co.*, 115 Fed. Rep. 669. One obvious and important, perhaps controlling, distinction between that case and this present one is that in that case "there seems to have been no question as to the freight being due," as is pointed out by Morton, J., in his opinion (Record, p. 31, top).

Moreover, in the *American Steel Barge Co.* case, the court was not in fact dealing with freights, or freight money, at all. The libel did purport to be filed by the libellant against "the cargo of coal now or late on board its Steamer 'City of Everett' and the freight on said cargo of coal," and a warrant issued purporting to run against the cargo and freights, but, as is shown by the Marshal's return, execution of it was stayed before service by his receiving from the claimant *of the cargo of coal*, a bond, reciting the filing by the obligor of a claim to "said cargo" only. The result was that the court had within its jurisdiction, and subject to the exercise of its power, only bail for the coal itself, and not the freight money, any substitute for it, or anything representing it.

Under these circumstances, the decision is to be taken as applicable to the cargo of coal only. So far as the opinion purports to deal with the claim for freight, it is *obiter dictum* only, and the decision is in no sense an adjudication that a mere claim for freight money can constitute a "res"; no such claim was before the court or within the scope of its powers. The court was in fact dealing with a cargo of coal only.

The report of the case in 115 Federal Reporter does not suffice to make clear what has just been said, but there is annexed to this brief, in the form of an appendix (Appendix B), a certified copy of the libel, the warrant, and the Marshal's

return, which show the facts stated above. Besides, the report of the case in the District Court, 107 Fed. Rep. 964, shows plainly that only the cargo of coal was before the court. The opening language of that report is: "In Admiralty, Libel of *cargo* under claim of lien, etc."

The opinion of the District Court states: "The lien on sub-freight given by the charter does not help the libellant, which here seeks to enforce *not a lien on freight, but a lien for freight*" (p. 972, top).

It is further submitted that the opinion of Putnam, J., in this case is, in any event, obscure and unsatisfactory, and fails signally to make clear the principles of law upon which it proceeds.

None of the authorities cited in his opinion hold that an unpaid and unliquidated claim for freight can constitute, in and of itself, a "res" such as can serve as the basis of an admiralty proceeding *in rem*. Indeed, the cases cited by the opinion are all proceedings *in personam*, except *"The Karnak"* and *"The Salacia,"* which are cited upon an entirely different point.

Other cases, upon which the libellant has either relied in the District Court, or may seek to rely here, are:

Frontier S.S. Co. v. *Central Coal Co.*, 234 Fed. Rep. 30.
Vane v. *Wood Co.*, 231 Fed. Rep. 353.
Bank of British North America v. *Freights*, 137 Fed. Rep. 534.
Freights of the "Kate," 63 Fed. Rep. 707.
The "Giles Loring," 48 Fed. Rep. 463, 473.
The "Conveyor," 147 Fed. Rep. 586.

Of these cases, *Frontier S.S. Co.* v. *Central Coal Co.*, *Vane* v. *Wood Co.*, and *The "Giles Loring"* are all libels *in personam*, and do not present, or decide, any such question as is at issue here.

Bank of British North America v. *Freights* is a libel *in rem*; but in that case, not only was the liability for freight undis-

puted, but the freight money had actually been collected and deposited in a bank in New York, where it constituted a defined, liquidated fund within the jurisdiction and power of the court.

> "The 'Ansgar' arrived at New York April 10, 1901, and the 'Hutton' April 26, 1901. Perry collected the freights, and of the amount he deposited about $39,000 to the credit of his account in the Bank of New York" (p. 536, top).

> "These actions were brought by the libellant, the Bank of British North America, to recover certain moneys on deposit with the Bank of New York. The moneys are alleged to be the earnings and freights of the steamships 'Ansgar' and 'Hutton' and were deposited by Edward Perry, the charterer of the steamers, who, upon their arrival in New York, collected the moneys and deposited them to his own credit in the said bank in 1901" (same case in the District Court—127 Fed. Rep., pp. 859-860).

In *Freights of the "Kate,"* there was no question of a claim for unpaid freights. The freights had been paid, and, not only had they been paid, but they had been "deposited subject to the order of the court" (p. 709).

"The Conveyor" was a libel for seamen's wages and supplies, and the "res" with which the decision dealt was the proceeds of the insurance policy upon the vessel, which had been deposited as a fund, and was within the jurisdiction of the court. The proceeds of this policy were, of course, incidental to, and represented, the vessel herself, which was the principal "res" of which the court had already acquired jurisdiction.

No authority has been found, and it is submitted with confidence that no respectable authority can be found, in which it has ever been decided that any unpaid and disputed claim for freight, or even any *unpaid* claim of that nature, whether disputed or undisputed, has ever been held to be such a "res" as can be of itself, without more, the sole subject of a proceeding *in rem* in the admiralty.

B. EVEN IF THERE HAD BEEN HERE SUCH A "RES," THAT "RES" WAS NEVER "WITHIN THE LAWFUL CUSTODY OF THE COURT."

> "Jurisdiction is the power to adjudicate a case upon the merits, and dispose of it as justice may require. As applied to a suit *in rem* for the breach of a maritime contract, it presupposes, first, that the contract sued upon is a maritime contract; and second, *that the property proceeded against is within the lawful custody of the court.* These are the only requirements necessary to give jurisdiction. Proper cognizance of the parties and subject-matter being conceded, all other matters belong to the merits." (Italics ours.)
>
> Brown, J., in *"The Resolute,"* 168 U. S. 437 (at p. 439).

The second requirement necessary to give to a court of admiralty jurisdiction *in rem*, as here stated by Brown, J., for the court, is that

> "the property proceeded against is *within the lawful custody of the court.*"

Not only must what is proceeded against be "property," as we have argued above, but the existence of jurisdiction presupposes that this property is within the lawful custody of the court.

Now, in our case, even if what was proceeded against, *i.e.*, the claim for freight money, could be properly designated as "property," it certainly was not within the custody of the court. Indeed, to get it within the custody of the court was the very thing which the libellant was trying to do and failed to accomplish. The Marshal did not seize anything. Palmer & Parker Co. did not pay over anything. On the contrary, they denied that there was anything to be paid over. The libellant filed a motion that they be ordered to pay into court. Such a motion necessarily presupposes that whatever it seeks to have paid over is not already in the custody of the court — if it were, the motion would be meaningless. That motion was never allowed.

The "custody" of property is a physical matter, and implies immediate physical control. There never was, in this case, anything whatever "within the lawful custody of the court."

The libellant has sought to rely in this connection upon the provisions of Admiralty Rule 37.

The obvious and conclusive answer to any such effort is that no court can, by its own rule, or by action under such a rule, confer jurisdiction upon itself. Any grant of jurisdiction to a court must, of necessity, come from the law-making power of the sovereign. The only possible source of jurisdiction in a court of the United States is legislation by Congress or a grant of power in the Constitution.

> "But no rule of court can enlarge or restrict jurisdiction."
>
> *Washington Southern Co.* v. *Baltimore & P. Steamboat Co.*, 263 U. S. 629, 635.

The only source of admiralty or maritime jurisdiction is the Constitution. Even Congress cannot enlarge the admiralty jurisdiction of the courts of the United States. (1 Kent's Commentaries, 13th Ed., p. *372.)

Neither Admiralty Rule 37, nor any other rule of court, can give to a district court of the United States any admiralty or maritime jurisdiction not already given to it by the Constitution.

It may be, however, that the argument of the libellant is meant to be one to the effect that the language of Rule 37 leads to the inference that the court which made that rule believed that jurisdiction *in rem* existed over a claim such as

the libellant in this case is seeking to proceed against, without such jurisdiction already existing over some principal "res" to which this claim is appurtenant or incident. It is submitted that the rule, fairly interpreted, does not lead to that inference, because its language—

> "Where freight, or other proceeds of property (are *attached to, or bound by*, the suit, which are in the hands or possession of any person, the court may, etc., etc."

does not, properly construed, refer to that actual physical "res" which constitutes the subject matter of the proceeding *in rem* and is already within the power of the court, but only to some appurtenance, or incident, of such a "res." The words "attached to, or bound by, the suit," are not appropriate to describe the principal "res" itself against which the proceeding is brought. Rule 37, it is submitted, is a rule of the same general nature as Rule 9—Rule 9 applying in suits against a ship, or its appurtenances, and Rule 37 in other proceedings *in rem*—the purpose of both rules being to bring within the physical power of the court mere incidents, or appurtenances, or proceeds, of some principal thing (*i.e.*, the "res" proceeded against) already within its power.

In other words, process under these two rules is merely auxiliary to a suit *in rem* already pending against some "res" already in the custody of the court.

> ". . . and where they (that is, Courts of Admiralty) have jurisdiction of the principal matter, it is suitable, and according to the analogies of law, that they should possess it over the incidents."
>
> 1 Kent's Commentaries, 13th Ed. p. *371, foot.

> "If the admiralty has cognizance of the principal thing, it has also of the incident, though that incident would not, of itself, and if it stood for a principal thing, be within the admiralty jurisdiction."
>
> 1 Kent's Commentaries, 13th Ed. p. *379.

Process under Rule 9, formerly Rule 8, has been described thus:

"The process to be first issued under this rule is auxiliary to a suit *in rem*."

Conkling's Admiralty Practice, 2d Ed., Vol. 2, pp. 155–56.

Even if an unpaid claim for freight money might, *as an incident of some principal thing or* "res," be within the cognizance of the admiralty in a proceeding *in rem*, still it cannot, if it must stand itself alone, as, and for, a principal thing, be the object of such a proceeding.

C. The reasons stated in the opinion of the District Court.

The appellee, in addition to what has been said above, relies also upon the arguments set forth, and upon the authorities cited, in the opinion of the District Court, but it seems unnecessary to undertake to repeat, or to restate, these here.

Other authorities to the same general effect as *In re Tarbox*, 185 Fed. Rep. 985, cited in that opinion, are:

Louisville Trust Co. v. Comingor, 184 U. S. 18.

First National Bank of Chicago vs. Chicago Title & Trust Co., 198 U. S. 280, 289, 290.

In re Hayden, 172 Fed. Rep. 623, and authorities there cited.

SUGGESTION

The appellee suggests that the District Court could not, in any event, have entertained this proceeding *in rem*, so-called, because it was not founded upon a maritime lien, which is the necessary basis of every admiralty proceeding *in rem*.

> "A maritime lien is said by writers upon maritime law to be the foundation of every proceeding *in rem* in the Admiralty."
>
> Brown, J., in *"The Corsair,"* 145 U. S. 335 (at p. 347).

> "It is true that there can be no decree *in rem* against the vessel except for the enforcement of a lien given by the maritime law, or by a state law."
>
> Brown, J., in *"The Resolute,"* 168 U. S. 437 (at p. 440).

> "Whether to proceed *in rem* or *in personam* in a given case is rather a question of substantive law than of practice. It depends on the question whether there is an admiralty lien, etc."
>
> Hughes on Admiralty, 2d Ed., p. 400, foot.

> "A maritime lien is the necessary basis for every admiralty proceeding *in rem*. Such a lien is a right of property and not a mere matter of procedure. The courts cannot create a new lien."
>
> Benedict on Admiralty, 5th Ed. Vol. 1, Ch. 3, Sec. 11, (pp. 14 and 15).

Such a maritime lien is the creature of the admiralty law. It is a *jus in re*, and *stricti juris*—a right closely resembling the *"privilegium"* of the civil law, a right which cannot be created by act of the parties, but is created only by admiralty jurisprudence.

> "It follows out the same principal that Mr. Justice Curtis states in *The Kiersage*," 2 Curt. 424, Fed. Cas. No. 7,762, that *admiralty liens are* stricti juris, *and that*

they cannot be extended argumentatively, or by analogy or inference. He says, 'They must be given by the law itself, and the case must be found described in the law.'"

Osaka v. Pacific Export Lumber Co., 260 U. S. 490 (at p. 500).

"The maritime lien is a secret one. It may operate to the prejudice of prior mortgagees or of purchasers without notice. It is, therefore, *stricti juris*, and will not be extended by construction, analogy or inference."

Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1 (at p. 12).

See, also,

Osaka v. Pacific Export Lumber Co., 260 U. S. 490 (at pp. 497, 499, 500).

"The Yankee Blade," 19 How. 82, 89.

There is no authority for a maritime lien in favor of a shipowner upon sub-freights created by admiralty jurisprudence.

Whether or not such a maritime lien existed here is not, however, in view of the decision of this court in *"The Resolute"* 168 U. S. 437, a question of jurisdiction, and it is the understanding of the appellee that, upon this appeal, only the question of jurisdiction is presented for decision and is open for argument.

See *Male v. Atchison, T. & S. F. Ry. Co.*, 240 U. S. 97 (at p. 101).

Mitchell Coal Co. v. Pennsylvania R.R. Co., 230 U. S. 247 (at p. 255).

Hegarty v. Southern Pacific Co., 228 U. S. 137 (at p. 144).

GASTON, SNOW, SAUNDERS & HUNT,
ROBERT H. HOLT,

Proctors for Palmer & Parker Co.

THOMAS HUNT,
JOHN H. LOWRANCE,

Of Counsel.

APPENDIX "A"

SUPREME COURT OF THE UNITED STATES
October Term, 1926

THE UNITED STATES OF AMERICA, *Appellant* v. FREIGHTS, SUB-FREIGHTS, CHARTER HIRE, AND OR SUB-CHARTER HIRE OF THE S.S. "MOUNT SHASTA"	No. 267

STIPULATION

By reason of certain omissions of material evidence from the record, and for the purpose of supplying the same, it is stipulated and agreed that the Court, in considering the jurisdictional question certified, take all allegations of fact contained in the special appearance of the appellee, filed November 13, 1922 (R. p. 12), the special appearance and objection of the appellee, filed November 16, 1922 (R. p. 14), and the answer of the appellee, filed November 27, 1922 (R. p. 15), as having been made in good faith, and all facts purported to have been found by the Court, as set forth in the opinion, as having been supported by the evidence, and by admission made in open court.

It is also stipulated and agreed that the exceptions to libel, appearing on page 5, and the answer, appearing on page 6 and continuing through page 10, shall be expunged from the record, said pleadings having been filed by inadvertence, never considered by the District Court, and included in this record by mistake.

WILLIAM D. MITCHELL,
Solicitor General for the Appellant, United States of America.

GASTON, SNOW, SALTONSTALL & HUNT,
Attorneys for Palmer & Parker Company, Appellee.

APPENDIX "B"

To the Judge of the District Court of the United States within and for the District of Massachusetts:

The American Steel Barge Company, of New York, N.Y., a corporation duly established by law under the laws of the State of New York, exhibits this its Libel and Complaint against *the cargo of coal* now or late on board its Steamer "City of Everett" *and the freight on said cargo of coal*, accruing under certain Bills of Lading dated December 30, 1898, at Newport News, and signed by W. W. Dalzell, master of said Steamer as more fully below set forth, in a cause of contract civil and maritime. And thereupon said Libellant alleges and articulately propounds as follows:

1. At the various dates below mentioned, it was, and it now is, the owner of the Steamship "City of Everett," of Everett, Washington, a vessel of 1732.80 tons net register.

2. On or about March 1, 1898, at New York, N.Y., there was made between it and the Atlantic Transportation Company, a corporation established under the laws of New Jersey and having a usual place of business in said New York, a written agreement of Charter Party, a copy whereof the Libellant asks leave to produce at the hearing of this case, whereby it let and said Atlantic Transportation Co. hired, for one year from April 5, 1898, the said Steamer "City of Everett," for the sum of $2,812.50 per month, to be paid monthly in advance, commencing from said April 5, 1898.

3. Under and according to said Charter Party there was due said Libellant on December 5, 1898, the stipulated sum of $2,812.50, being the monthly hire of said Steamer then to be paid in advance according to said Charter Party. Yet, though requested, said Atlantic Transportation Co. has not paid and still neglects and refuses to pay the said sum, and the same is now due and payable to said Libellant.

4. In and by said Charter Party it was expressly agreed that said Libellant should have a lien upon all cargoes and all sub-freights for charter money due under said Charter Party.

5. On or about December 30, 1898, there was shipped on board said Steamer at Newport News, Va., for transportation to Boston, consisting of about 3843 tons New River Steam Coal, consigned to C. H. Sprague & Son or their assigns at said Boston. Bills of Lading were signed and issued by the master of said Steamer for said cargo by the direction of said Charterer or its agents, according to which said cargo was to be delivered at Boston to said C. H. Sprague & Son or their assigns he or they paying freight for the said coal "as agreed." The Libellants are ignorant what rate of freight was agreed between said shipper and charterer and cannot therefore state the amount thereof.

6. Said Steamer thereafter sailed from Newport News with said cargo on board and on January 9, 1899, arrived at Boston and has made due delivery of said cargo according to said Boston and has earned the freight thereon. The above shipment transportation and delivery were all within the period covered by said Charter Party, and the freight on said cargo under said Bill of Lading is a sub-freight within the provisions of said Charter Party.

7. Said cargo of coal and said consignees and their said assigns whom the Libellant is informed and believes and therefore alleges to be the Metropolitan Coal Company of said Boston are all at said Port of Boston and within the jurisdiction of this Court.

8. All and singular the premises are true and within said jurisdiction.

WHEREFORE said Libellant, claiming a lien upon said cargo and said sub-freight thereon according to said Charter Party to the amount of the Charter hire due and unpaid as above, prays as follows:

(1) That process in due form of law may issue against said cargo of coal and against said sub-freight thereon.

(2) That all persons having any interest in said cargo

or said sub-freight may be summoned to appear and answer the premises.

(3) That the Court will decree in its favor for the amount of Charter hire due and unpaid as above and order the same to be paid with their costs.

(4) That said cargo may be ordered by the Court to be sold and the proceeds thereof applied to said payment.

(5) That said C. H. Sprague & Son and said Metropolitan Coal Co. may be ordered by the Court to pay into Court the freight due on said cargo under said Bill of Lading, whatever its amount may be or from whichever of them it may be due and that the same may be applied to the payment of the decree prayed for above.

(6) For such other and further relief as law and justice may require.

FREDERIC DODGE
EDWARD S. DODGE } *Proctors*

THE AMERICAN STEEL BARGE COMPANY
By FREDERIC DODGE
its Atty.

UNITED STATES OF AMERICA
STATE AND DISTRICT OF MASS.
SUFFOLK ss.

On this thirteenth day of January 1880 personally appeared before me at Boston in said County, the above named Frederic Dodge and made due oath that the statements of the foregoing *libel*, by him subscribed on behalf of the libellant are true to the best of his knowledge information and belief. Witness my hand and Notarial Seal.

CHARLES WALCOTT
Notary Public

(SEAL)

ENDORSED.
Mar T. 1901.

AMERICAN STEEL BARGE COMPANY

v.

CARGO OF COAL EX. STEAMER "CITY OF EVERETT" AND THE FREIGHT THEREON, &c.

LIBEL.

WARRANT & MONITION
issued returnable
Jan 27th 10 A.M.

UNITED STATES DISTRICT COURT
Filed in clerk's office
Mass. Dist. Jan 13 *1899*

Massachusetts District, ss. } The President of the United States of America, To the Marshal of said District, or either of his Deputies, Greeting.

(Seal) We command you that you give notice to all persons concerned, that a Libel is filed before the Honorable Francis C. Lowell Esquire, Judge of the District Court for said District, by

The American Steel Barge Company of New York, N.Y., *Libellant*,

against

The cargo of coal now or late on board steamer "City of Everett" and the freight on said cargo of coal

And against all persons lawfully intervening for their interest therein, in a cause of contract Civil and Maritime. And that trial will be had on said Libel at a District Court to be holden at the United States Court House in Boston, in said District of Massachusetts, on Friday the twenty-seventh day of January 1899 at ten o'clock A.M. And you are to give said notice by advertising the same in the *Boston Daily Advertiser* one of the public newspapers printed at Boston and by posting a copy of the same notice at the said Court House in Boston, seven days at least before said day of trial. And you are to take the said Cargo of coal and the freight thereon into your custody.

And make due return hereof, with your doings herein.

Witness, the Honorable Francis C. Lowell Esquire, at Boston, this thirteenth day of January A.D. 1899.

Frank H. Mason, *Clerk*.

United States of America.

Massachusetts District, ss. January 16 1899

I hereby certify that the execution of the within warrant has been stayed before service on my receiving this day a bond from the claimant of the cargo of coal against which said warrant was issued under the provisions of section 941 of the Revised Statutes of the United States approved by the Judge of the District Court of the United States for the said District of

Massachusetts in which the within named cause is pending, and that I have returned the said bond to the said Court.

HENRY W. SWIFT
U. S. Marshal

ENDORSED:
1021 980
AMERICAN STEEL BARGE CO.
Libl.
vs.
CARGO OF COAL EX STEAMER
CITY OF EVERETT & FREIGHT

WARRANT AND MONITION.

United States
Room 101 P.O. Building
Jan 16 1899
Boston, Mass
Marshal's Office.

UNITED STATES DISTRICT COURT
Filed in clerk's office
Mass. Dist. Jan 17 1899

KNOW ALL MEN BY THESE PRESENTS, that The Chesapeake and Ohio Coal Agency Company, a corporation duly established by law under the laws of the State of New Jersey, having its usual place of business at New York City, is holden and stands firmly bound and obliged to Henry W. Swift, Marshal of the United States for the District of Massachusetts or his successors in said office, in the full and just sum of two thousand five hundred and fifty dollars to the payment whereof it binds itself and its successors firmly by these presents. IN WITNESS WHEREOF it has set its corporate seal and caused these presents to be subscribed by C. B. Orcutt its President thereto duly authorized, this fourteenth day of January 1899.

The condition of this obligation is such, that WHEREAS

there has been filed in the District Court of the United States within and for the District of Massachusetts by The American Steel Barge Company, a corporation duly established by law under the laws of the State of New York a libel in Admiralty against a cargo of coal on board its steamer "City of Everett" and now at Boston in said District, and against the freight due thereon, to recover certain moneys alleged in said libel to be due to it for charter hire under a certain Charter Party in said libel referred to, —

And whereas process *in rem* has been issued by said Court on said libel, directing said Marshal to arrest said cargo of coal and said freight due thereon, and said Chesapeake and Ohio Coal Agency Company has filed its claim to said cargo, and desires to stay the execution of said process by giving bond as provided by law, —

And whereas it is agreed by said libellant that the amount of the bond to be so given, instead of being double the amount claimed by said libellant, may be the sum above named.

Now, therefore, if the said Claimant shall answer the decree of the Court in said cause and abide by all orders or decrees, interlocutory or final of said Court, and shall pay the amount of the final decree of the Court, and all sums of money that it shall be ordered to pay by the final decree of the Court, whether it be in this or in any appellate Court, then this obligation shall be void, otherwise it shall be and remain in full force and virtue.

Chesapeake & Ohio Coal Agency Co.
Per C. B. Orcutt
(Seal) *President*

January 16 1899
The above Bond is approved by the Court.
Francis C. Lowell
U. S. Dist. Judge

The libellant agreeing to limit its claim against the cargo to the freight money earned upon the cargo referred to in the libel, and to claim a lien on the cargo only in the amount of such freight money, it is agreed that such freight money

amounts to $2,550., and that bond be given in that amount, all without prejudice to the defenses of the Chesapeake and Ohio Coal Agency Company that no lien exists upon the cargo in favor of libellant to that or any amount, and that no such lien exists in any event for a greater amount than the amount of freight actually due and unpaid on arrival.

50 cent revenue stamp documentary cancelled

FREDERIC DODGE
for libellant Am. St. Bge Co.

J. B. WARNER for Chesapeake & Ohio Coal Agency Company

approved

STETSON, JENNINGS & RUSSELL
Counsel for claimant.

BUTLER, NOTMAN, Jo- - - &Ny- - - - - - -

Counsel for Libellant

ENDORSED
986
The Chesapeake & Ohio Coal Agency Company,
-to-
Henry W. Swift, Marshal &c.

BOND.

The within bond is accepted and agreed to by libellant who consents to the amount stated and that no sureties need be given.

AMERICAN STEEL BARGE CO.
by their Proctor
FREDERIC DODGE.

UNITED STATES DISTRICT COURT
Filed in clerk's office
Mass. Dist. Jan 17 1899

DISTRICT COURT OF THE UNITED STATES

DISTRICT OF MASSACHUSETTS

I, JAMES S. ALLEN, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing are true copies of the Libel filed January 13, 1899, Warrant and Monition, issued January 13, 1899, and of Bond, filed January 17, 1899, with all the endorsements thereon, in the cause in said District Court, entitled,

No. 986 Civil.

AMERICAN STEEL BARGE COMPANY
Plaintiff,

v.

CARGO OF COAL EX. STEAMER "CITY OF EVERETT" AND THE FREIGHT THEREON &C.
Defendant,

now determined in said District Court.

[SEAL]

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of said Court, at Boston, in said District, this twenty-third day of March, A.D. 1927.

JAMES S. ALLEN
Clerk.

SUPREME COURT OF THE UNITED STATES.

No. 267.—October Term, 1926.

The United States of America, Appellant, *vs.* Freights, Sub-freights, Charter Hire, and or Sub-Charter Hire of the S.S. 'Mount Shasta.'	Appeal from the District Court of the United States for the District of Massachusetts.

[May 31, 1927.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a libel in admiralty against sub-freight alleged to be in the hands of the Palmer and Parker Company of Boston in the District of Massachusetts. It was dismissed by the District Court for lack of jurisdiction, 291 Fed. Rep. 92, and the decree having been entered on March 17, 1925, before the Act of February 13, 1925, c. 229, §§ 1, 14; 43 Stat. 936, 938, 942, went into effect, a direct appeal was taken to this Court under § 238 of the Judicial Code. The *Ira M. Hedges*, 218 U. S. 264, 270.

The United States, owner of the Steamship Mount Shasta, in May, 1920, made a bare boat charter of the vessel to the Mount Shasta Steamship Company through Victor S. Fox and Company, Inc., an agent of that Company, stipulating for a lien upon all cargoes and all sub freights for any amounts due under the charter party. Victor S. Fox and Company in July, 1920, made a sub-charter to Palmer and Parker Company for a voyage to bring a cargo of mahogany logs from the Gold Coast, Africa, to Boston. The vessel arrived in Boston with its cargo on February 19, 1921. There is due to the libellant $289,680 for the hire of the steamship, and the libel alleges that there is due and unpaid freight on the cargo of logs, $100,000, more or less, in the hands of Palmer and Parker Company, on which this libel seeks to establish a lien. It prays a monition against Palmer and Parker Company and all

persons interested, commanding payment of the freight money into Court, &c. Palmer and Parker Company was served. That Company filed exceptions to the libel, denied the jurisdiction of the Court and answered alleging ignorance of the original charter party and of the relations of the United States and the Mount Shasta S.S. Company to the vessel, and setting up counterclaims more than sufficient to exhaust the freight. The cargo had been delivered. The District Court assumed that a libel *in rem* could be maintained against freight money admitted to be due and payable, but was of opinion that the fund must exist when the suit is begun, or that the jurisdiction fails. The Court held that where, as here, the liability was denied in good faith, it did not appear that there was any res to be proceeded against and that the suit must be dismissed. The counsel for Palmer and Parker Company pressed the same considerations here in a somewhat more extreme form.

By the general logic of the law a debt may be treated as a res as easily as a ship. It is true that it is not tangible, but it is a right of the creditor's, capable of being attached and appropriated by the law to the creditor's duties. The ship is a res not because it is tangible but because it is a focus of rights that in like manner may be dealt with by the law. It is no more a res than a copy-right. How far in fact the admiralty has carried its proceeding *in rem* is a question of tradition. We are not disposed to disturb what we take to have been the understanding of the Circuit Courts for a good many years, and what the District Court assumed. *American Steel Barge Co.* v. *Chesapeake & Ohio Coal Agency Co.*, 115 Fed. Rep. 669; *Bank of British North America* v. *Freights of the Hutton*, 137 Fed. Rep. 534, 538; *Larsen* v. *150 Bales of Sisal Grass*, 147 Fed. Rep. 783, 785; *Freights of the Kate*, 63 Fed. Rep. 707.

But if it be conceded that the Admiralty Court has jurisdiction to enforce a lien on sub-freights by a proceeding *in rem*, and a libel is filed alleging such sub-freights to be outstanding, we do not perceive how the Court can be deprived of jurisdiction merely by an answer denying that such freights are due. The jurisdiction is determined by the allegations of the libel. *Louisville & Nashville R. R. Co.* v. *Rice*, 247 U. S. 201, 203. It may be defeated upon the trial by proof that the res does not exist. But the allegation of facts that if true make out a case entitles the party making them

to have the facts tried. It is said that the Court derives its jurisdiction from its power, and no doubt its jurisdiction ultimately depends on that. But the jurisdiction begins before actual seizure, and authorizes a warrant to arrest, which may or may not be successful. Here the debtor is within the power of the Court and therefore the debt, if there is one, is also within it. The Court has the same jurisdiction to try the existence of the debt that it has to try the claim of the libellant for the hire of the Mount Shasta. If the proof that there is freight due shall fail it does not matter very much whether it be called proof that the Court had no jurisdiction or proof that the plaintiff had no case. Either way the libel will be dismissed. See *Ira M. Hedges*, 218 U. S. 264, 270. *Lamar* v. *United States*, 240 U. S. 60, 64.

Decree reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 267.—October Term, 1926.

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[May 31, 1927.]

The separate opinion of Mr. Justice McReynolds.

I am unable to accept the view that an admiralty court may entertain an action *in rem* when there is nothing which the marshal can take into custody. The technical term *in rem* is used to designate a proceeding against some thing. This court and text writers again and again have pointed out the essential nature of such thing. The jurisdiction is founded upon physical power over a *res* within the district upon the theory that it is "a contracting or offending entity," a "debtor" or "offending thing", something that can be arrested or taken into custody, or which can be fairly designated as tangible property. *The Sabine*, 11 Otto 384, 388; *The Robert W. Parsons*, 191 U. S. 17, 37; Benedict on Admiralty, 5th ed., Secs. 11, 297; Hughes on Admiralty, 2d ed., 400, 401; Admiralty Rules 10, 22.

Here the thing supposed to be within the district and proceeded against was an unliquidated, uncertain and disputed claim for freight, which manifestly could not be arrested or taken into custody. To base jurisdiction for an action *in rem* upon this intangible claim would amount to a denial of the essential nature of the proceeding.

Of course, jurisdiction of an admiralty court—that is, power to hear and adjudge the issues, not merely to send out a monition—is not finally to be determined by mere allegations of the libel any

more than jurisdiction of a court of law ultimately depends upon the plaintiff's allegation that the defendant is alive and within the district. If it appear that the defendant has never been there or was dead when the action began, certainly the court can go no further.

An examination of *Freights of the Kate*, 63 Fed. 707; *American Steel Barge Co.* v. *Chesapeake & Ohio Coal Agency Co.*, 115 Fed. 669; *Bank of British North America* v. *Freights of the Hutton*, 137 Fed. 534, 538; and *Larsen* v. *150 Bales of Sisal Grass*, 147 Fed. 783, 785, I think, will fail to disclose any adequate support for the theory repudiated by the court below. Some language of *American Steel Barge Co.* v. *Chesapeake & Ohio Coal Agency Co.*, taken alone, seems to favor that view; but, in fact, the libel there was against "the cargo of coal" "and the freight on said cargo of coal." The prayer asked for process against "said cargo of coal and against said sub-freight thereon," and "that said cargo may be ordered by the court to be sold and the proceeds thereof applied to said payment."

The decree below should be affirmed.